

HUSCH BLACKWELL

Indiana University Title IX Training



October 2022



Housekeeping

- Not recording & recording is not permitted
- Slides will be provided by email after the training concludes
- Check Zoom name
- Let's discuss! Raise hand, use chat, or just jump in
 - In hypotheticals
- Other breaks—take individually as needed
- Context



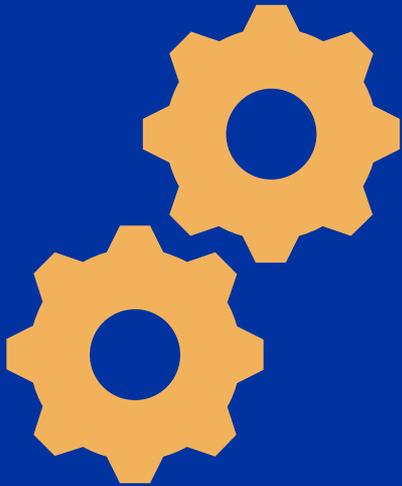


Poll Questions

[Pollev.com/huschedu2](https://pollev.com/huschedu2)

- Text HUSCHEDU2 to 22333

Group Scenarios



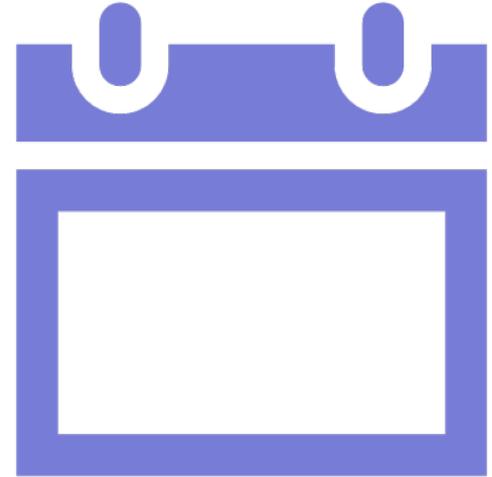
Breakout Groups

- Scenarios discussed in Breakout Groups
- Introduce yourselves and select a spokesperson
- Scenario and questions for each Group
Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Cameras on for breakouts



Agenda

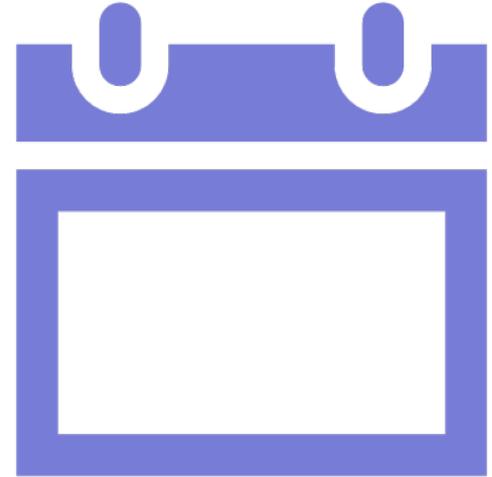
- Key Legal Principles and Considerations
- Applicable Policy Requirements
- Bias, Stereotyping, Conflicts of Interest, and Trauma
- Resolution Options and Case Processing
- Informal Resolutions and Confidentiality
- Addressing Other Misconduct
- Relationship Between Title VII and Title IX

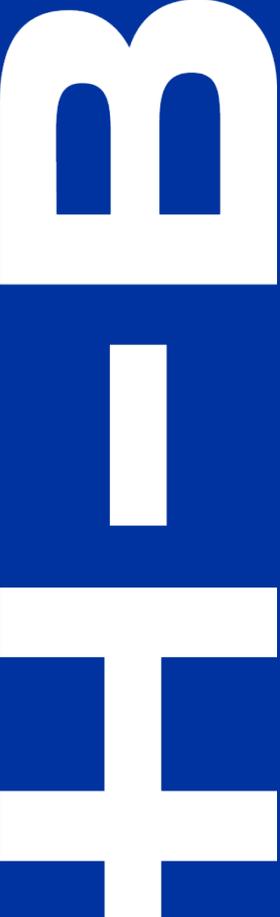




Agenda - Continued

- Transgender Legal Considerations
- Investigations and Key Issues
- Evidentiary Concepts for Investigators
- Investigation Report Writing
- Hearings and Appeals Summary for Investigators
- Pregnancy Discrimination



The logo for Husch Blackwell, consisting of a stylized white 'B' at the top, a vertical bar in the middle, and a stylized 'H' at the bottom, all on a blue background.

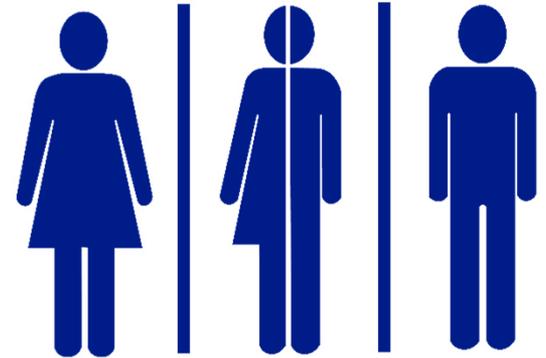
HUSCH BLACKWELL

Module 1:
Key Legal Principles
and Considerations

What is Title IX?

“[N]o person in the United States shall ***on the basis of sex*** be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity ***receiving federal financial assistance.***”

34 C.F.R. § 106.31



Who does Title IX apply to?

- Entities that receive federal financial assistance, including colleges and universities that participate in Title IV funding
 - Not individual persons
 - But institutions are required to adopt policies and procedures to implement Title IX that *do* apply to individual persons

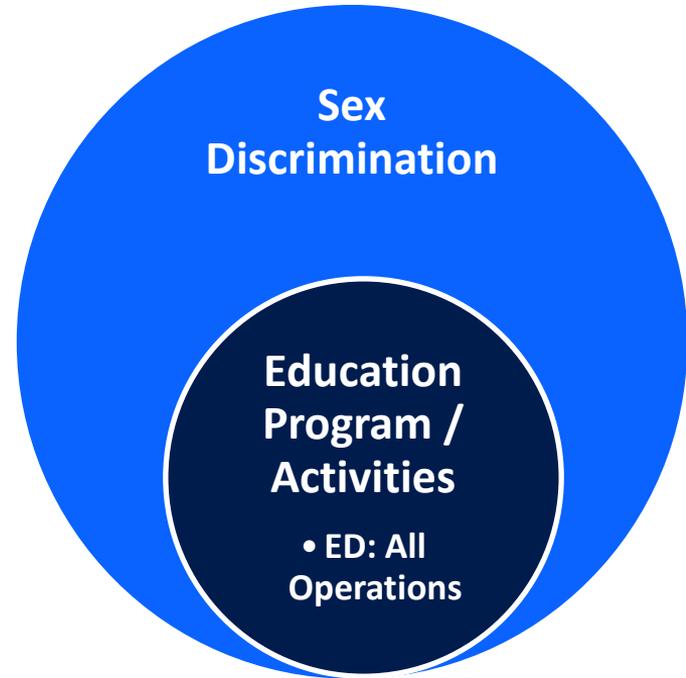


Poll question

- Does Title IX apply only to academic activities and athletic participation?
 - Yes
 - No

What sex discrimination does Title IX apply to?

- Title IX applies to sex discrimination in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



What are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Sports teams

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

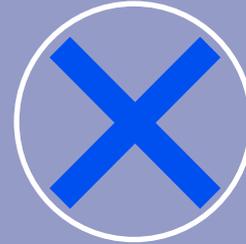
Does Title IX apply to off-campus sexual harassment?



Yes, if the conduct at issue occurs in the context of an education program or activity

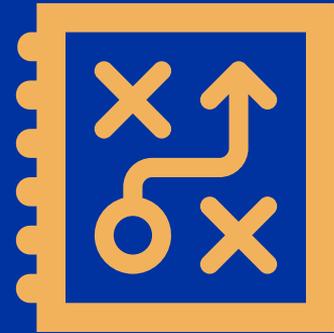


Yes, if the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization



No, if it occurs in a private location and is not part of an institution's education program or activity

Example (included in EP&A)



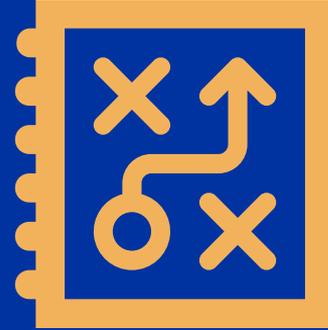
Student is sexually assaulted in a library study room on-campus. The sexual assault occurs on a Saturday evening. The identity of the perpetrator is not immediately known.

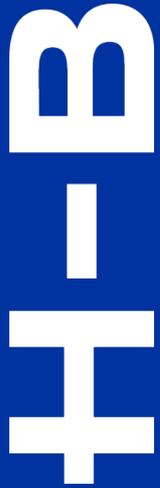


Example (included in EP&A)

—

The debate team travels to a different school for a tournament and stays overnight at a hotel. At the hotel where the team is staying, the advisor sexually harasses the team's captain.





Example (excluded from EP&A)



During spring break, two students travel to another state and stay at an all-inclusive resort owned by a prominent hotel chain. The students booked the trip on their own for leisure purposes. While staying at the resort, one student sexually assaults the other student.



Does Title IX apply to sexual harassment in other countries?

- No – the Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment



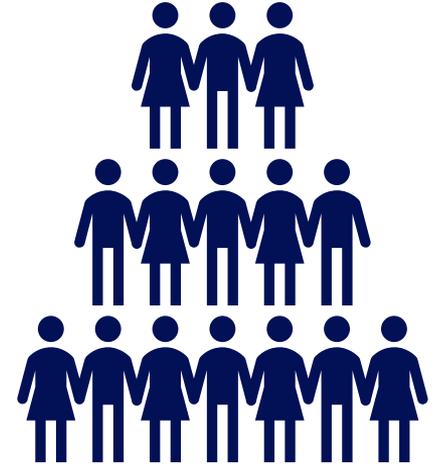


Additional Legal Considerations



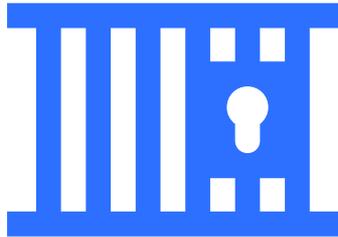
Title VII of the Civil Rights Act of 1964

- Prohibits discrimination in employment (private and public) based on:
 - Race
 - Color
 - Religion
 - National Origin
 - Sex





The Clery Act



A federal law requiring institutions to collect and publish statistics for certain crimes reported to have occurred on the university's "Clery Geography" (i.e., occurring on campus, on public property within or immediately adjacent to campus, and on other non-campus university property), for the purpose of informing current and prospective students, faculty or staff.



Violence Against Women Reauthorization Act of 2013 (VAWA)

Codification of Title IX principles

Sexual misconduct policy

Statements of rights and options

Support persons

Training

Applicable disabilities statutes



- The Americans With Disabilities Act
- Section 504 of the Rehabilitation Act

FERPA

- Sexual harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Records containing identifying information on students are subject to FERPA analysis
- The Title IX regulation contains an express preemption, permitting FERPA-protected material to be used as required by Title IX itself





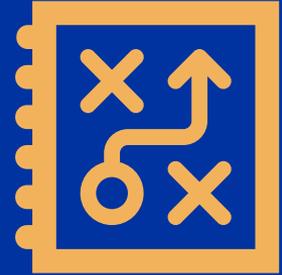
Are parties allowed to talk about a case?

- Title IX regulation prohibits an institution from restricting the ability of a party to discuss the allegations under investigation or to gather or present evidence
- First Amendment additionally limits public institutions' ability to restrict speech about a case
- Witness manipulation and intimidation can still be addressed by institution



Example (permitted communication)

—
Respondent in sexual harassment case affirmatively calls several other students who know complainant. Respondent tells such persons about the allegations and is attempting to determine whether the complainant discussed the effect of respondent's actions with any of them.

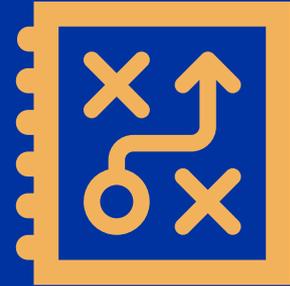




Example (institution may restrict)

—

Complainant contacts witness who complainant knows will testify to witness' belief, based on observation, that complainant was not incapacitated and desired to have sex with respondent. Complainant tells witness to ignore investigator's request for an interview, to lie if witness is asked what witness observed, and not to show up at a hearing under any circumstances.





Are interviews and hearings confidential?

- Institution should restrict access to investigations and hearings to those persons whose attendance is required to effectuate policy
- Parties may be accompanied by advisors of choice and potentially others if justified by the need for a reasonable accommodation
- Media should not be granted access to interviews and hearings

Political and Regulatory Updates

Political Update – “Sex”

Mar. 8, 2021 Executive Order

- Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity
- Authorizes the Secretary of Education to take additional action to enforce this policy

June 16, 2021 Guidance

- Department of Education says Title IX prohibits discrimination based on sexual orientation and gender identity

Regulatory Update

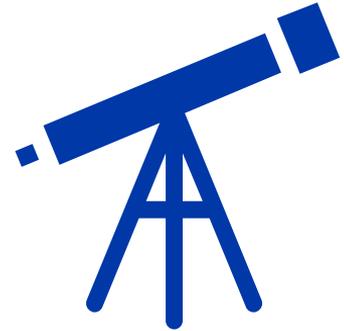
- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- 60 days for public comments



Notable Title IX Proposed Changes

Scope of Coverage

- Explicitly includes as forms of sex discrimination under Title IX discrimination based on pregnancy, sexual orientation, gender identity, sex stereotypes, or sex characteristics



Notable Title IX Proposed Changes

Hostile Environment

- Modifies the definition of hostile environment sexual harassment to align with Title VII
- Unwelcome sex-based conduct that is sufficiently severe *or* pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from an education program or activity



Notable Title IX Proposed Changes

Quid Pro Quo

- Applies to conduct by agents or other persons authorized by the institution to provide an aid, benefit, or service under the institution's education program or activity
- Does not apply to students with leadership positions in extracurricular activities because such students are typically not authorized by an institution to provide aid, benefits, or services under an institution's education program or activity



Notable Title IX Proposed Changes

Jurisdictional Scope

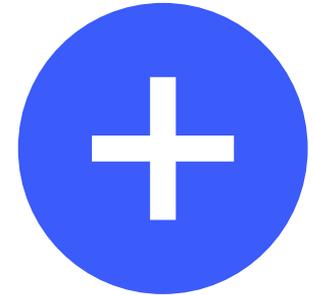
- Title IX does not apply to sex-based harassment occurring (1) outside an institution's education program or (2) outside the U.S. where does not contribute to a hostile environment in institution's education program or activity in the U.S.
- Conduct occurring within an institution's education program and activity includes conduct that occurs off-campus when the respondent represents the institution or is otherwise engaged in conduct under the institution's "disciplinary authority"
- Harassment occurring outside of an educational program or activity can nevertheless violate Title IX if contributes to a hostile environment within an educational program or activity



Notable Title IX Proposed Changes

Grievance Process

- Expands application of the grievance process requirements to all forms of sex discrimination, not just sexual harassment
- BUT -- includes additional requirements for sexual harassment complaints involving students at postsecondary institutions and generally preserves more of the procedural requirements of the current regulations.



Notable Title IX Proposed Changes

Definitions

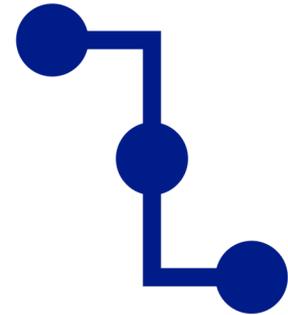
- Refines definitions of retaliation to include “intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in an institution’s Title IX process.”
- Adds definition of peer retaliation: retaliation by one student against another student.



Notable Title IX Proposed Changes

Less Stringent Procedures

- Relaxes several procedural processes:
 - Complaints may be made orally or in writing
 - Removes the participation requirement for students, employees, & those persons authorized to act on their behalf
 - Mandatory dismissal now permissive
 - Evidence review process



Notable Title IX Proposed Changes

Advisors

- The right to an advisor would be preserved in sexual harassment complaints involving postsecondary students, but that is not the case for complaints of sexual harassment that do not involve students or sex discrimination complaints



Notable Title IX Proposed Changes

Confidential Employees

- Employees whose communications are privileged under law and are associated with their role or duties for the institution;
- Employees whom the institution has designated as a confidential resource for the purpose of providing services to individuals in connection with sex discrimination; and
- Employees of postsecondary institutions who conduct human subjects research studies that have been approved by the institution's Institutional Review Board and that are designed to gather information about sex discrimination.



Notable Title IX Proposed Changes

Live Hearings

- Eliminates the live hearing requirement and allows use of the single-investigator model
- Institutions must develop a process for assessing credibility that could be satisfied by either “advisor-conducted questioning at a live hearing” or having the “decisionmaker ask their questions and the parties’ questions of any party and witnesses during individual meetings”



Notable Title IX Proposed Changes

Cross-Examination

- In live hearings, the decision-maker must determine the relevance of advisor-conducted questioning prior to a party answering. The decision-maker should not permit questions that are “vague or ambiguous, or harassing of the party being questioned.”
- If a party does not respond to questions related to their credibility, the decision-maker must not rely on any statement of that party that supports that party’s position.



Notable Title IX Proposed Changes

Determinations

- Notice of determination need not be in writing or include any specific details in sex discrimination complaints or sexual harassment complaints that do not involve postsecondary students
- Must provide written determination of whether sex-based harassment occurred in cases involving postsecondary students

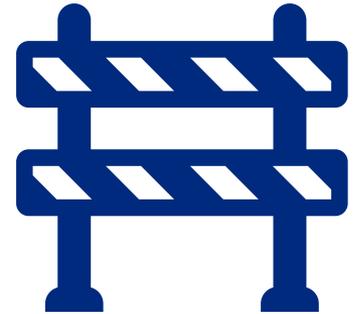


Notable Title IX Proposed Changes

Title IX Coordinator

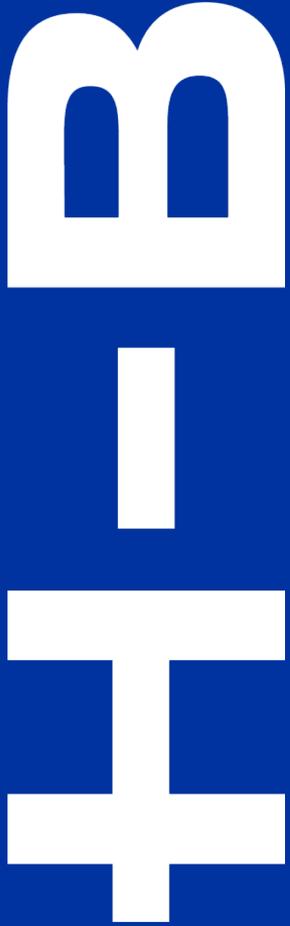
Must monitor barriers to reporting conduct that may constitute sex discrimination; and that the institution must take steps reasonably calculated to address identified barriers:

- regular campus climate surveys
- Targeted feedback from students and employees who have reported or made complaints about sex discrimination
- public awareness events for purposes of receiving feedback from student and employee attendees,
- publicizing and monitoring an email address designated for anonymous feedback about reporting barriers.



Questions





HUSCH BLACKWELL

Module 2:
Applicable Policy
Requirements



Standard of Evidence

Preponderance of the evidence

=

“more likely than not”



IU Updated Policy

Reporting of Prohibited Conduct

- Employee Reporting Obligations:
 - ***Discrimination & Harassment:*** University employees with teaching responsibility or supervisory authority within the university are obligated to promptly report incidents of discrimination or harassment, to the designated campus Equity Official.



Reporting of Prohibited Conduct - Continued

IU Updated Policy

- Employee Reporting Obligations:
 - **Sexual Misconduct:** Employees designated as “Responsible Employees” are obligated to promptly report incidents of sexual misconduct to the University Coordinator or their designated campus Deputy Coordinator. Responsible Employees include:
 - All employees with teaching responsibility, including academic appointees, student academic appointees, and any others who offer instruction (whether in-person or online) or office hours to students;
 - All advisors;
 - All coaches and other athletic staff who interact directly with students;
 - All student affairs administrators;
 - All residential hall staff;
 - All employees who work in offices that interface with students; and
 - All supervisors and university officials



Exempt Disclosures

- Employees who otherwise have reporting obligation under this policy are exempt from reporting disclosures of discrimination, harassment and/or sexual misconduct when made during limited situations, including:
 - i. Disclosures made as part of participation in research activities that have received human studies approval through the university's Institutional Review Board (IRB);
 - ii. Disclosures made as part of an academic assignment;
 - iii. Disclosures made at public awareness events;
 - iv. Disclosures made during the course of communications protected as privileged communications under applicable law, including attorney-client privilege and medical professional privilege



Purposes of Policy

- Indiana University is committed to the success, safety and well-being of all members of the university community, including students, academic appointees, and staff. Indiana University recognizes that discrimination, harassment, and/or sexual misconduct may result in grave and often long-lasting effects on those involved and is committed to conducting timely investigation of allegations and to taking appropriate actions and consequences following investigations.
- Indiana University is committed to compliance with state and federal laws regarding discrimination, harassment and/or sexual misconduct, to making required reporting to state and federal agencies, and to working with law enforcement officials and agencies where applicable. The university is also committed to using its resources in research and education to improve programs aimed at preventing and reducing discrimination, harassment and sexual misconduct in our community and ensuring safe, diverse, equitable, and inclusive communities.



Scope of Policy

- This policy applies to all members of the Indiana University community, including:
 - All students;
 - All academic appointees, staff and part time (hourly) employees
 - All others while on Indiana University property, including employees of third-party vendors and contractors, volunteers, and visitors, and others while involved in an off-campus Indiana University program or activity



Scope of Policy - Continued

- Other University policies and codes related to misconduct remain in effect for complaints of misconduct other than discrimination, harassment and/or sexual misconduct. However, any report or complaint of misconduct that includes elements of the covered behaviors below may be addressed in accordance with this policy and its related complaint resolution procedures.



IU Definition of Sexual Harassment for University Complaint Resolution Procedures

IU Updated Policy

- Conduct on the basis of sex or that is sexual in nature that satisfies one or more of the following:
 - A member of the University conditioning the provision of an aid, benefits, or service of the University, on an individual's participation in unwelcome sexual conduct
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive or persistent, and objectively offensive, that it effectively denies a person equal access to the University's education programs or activities
- Sexual harassment also include sexual assault, dating violence, domestic violence, and stalking

What is sexual harassment?

Conduct on the Basis of Sex that is:

Quid
Pro Quo
Harassment

Hostile
Environment
Harassment

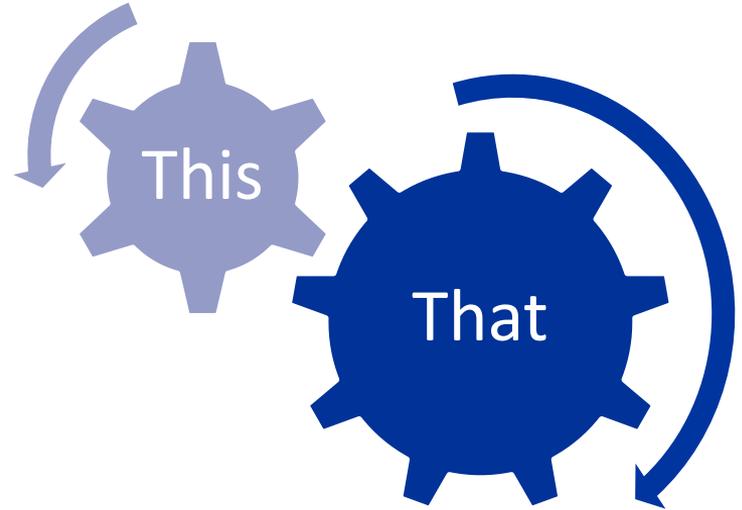
Sexual
Assault

Relationship
Violence

Stalking

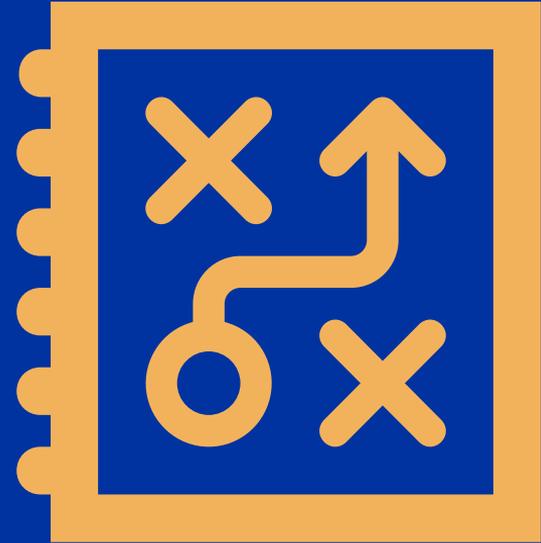
What is quid pro quo?

- **Title IX-Designated**
- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
 - Often arises in the employment context or where an employee holds a position of authority over a student

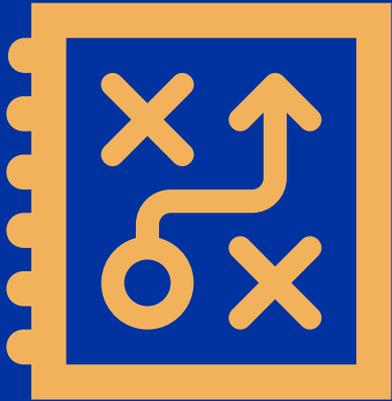


Example of quid pro quo

Manager tells subordinate employee that subordinate will not get a raise this year unless subordinate performs sexual favors for manager. Subordinate is in a relationship with another individual and has no interest in performing sexual favors for manager.



Another example of quid pro quo



A faculty member tells a student that the student can increase the student's grade if the student wears revealing clothing that is "more pleasing" to the faculty member's eye.

Poll question

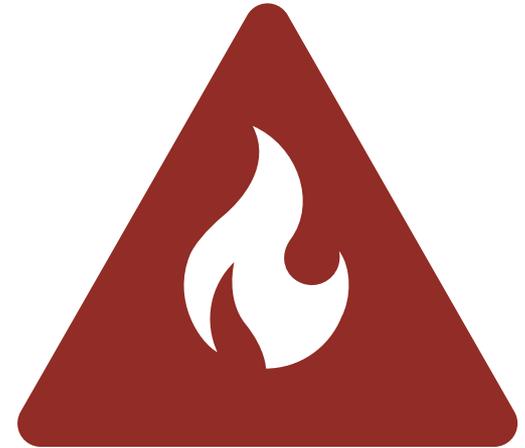
When considering whether a hostile environment exists, whose perspective do we consider?

- The complainant's
- A reasonable person's
- Both



What is hostile environment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive or persistent, and objectively offensive that it effectively denies a person equal access to the University's education programs or activities.





How do we determine if a hostile environment exists?

- Determined by considering totality of circumstances from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns
- Relevant facts and circumstances include:
 - The type of misconduct
 - The frequency of the misconduct
 - Where the misconduct occurs
 - Whether a power differential exists, etc.
- From the perspective of a reasonable person

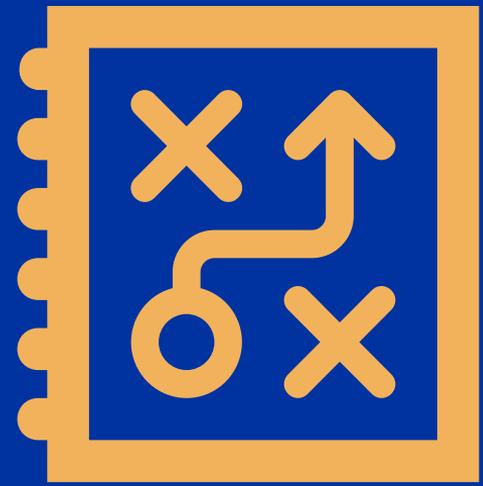
Example of hostile environment

Employee A repeatedly propositions Employee B despite Employee B repeatedly saying “not interested.” Employee A also repeatedly comments on Employee B’s physique, tells unwelcome sexual jokes to Employee B, and rubs employee B’s shoulders.

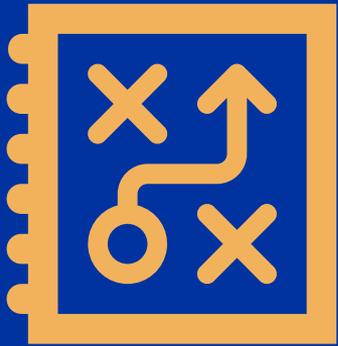


Another example of hostile environment

Bookworm student repeatedly gropes Social Butterfly student's buttocks when the two are in the elevator of the library. Butterfly has no romantic interest in Bookworm and has told Bookworm to stop. But Bookworm persists, causing Butterfly to use the stairs instead of the elevator and to avoid Bookworm in other areas of library and campus buildings.



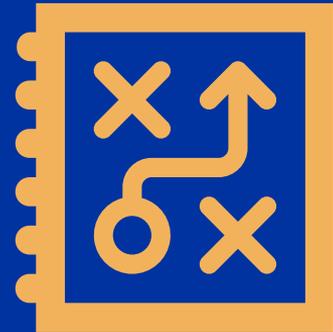
One more example of hostile environment



Teaching Assistant asks Student to go on a date, and Student says “no.” TA then repeatedly sends Student text messages using various vulgar terms that suggest Student is promiscuous. When TA and Student are in class, TA mutters these vulgar terms toward Student, loud enough for others to hear. Student blocks TA’s phone number and drops the biology class to avoid TA.

Example (not-hostile environment)

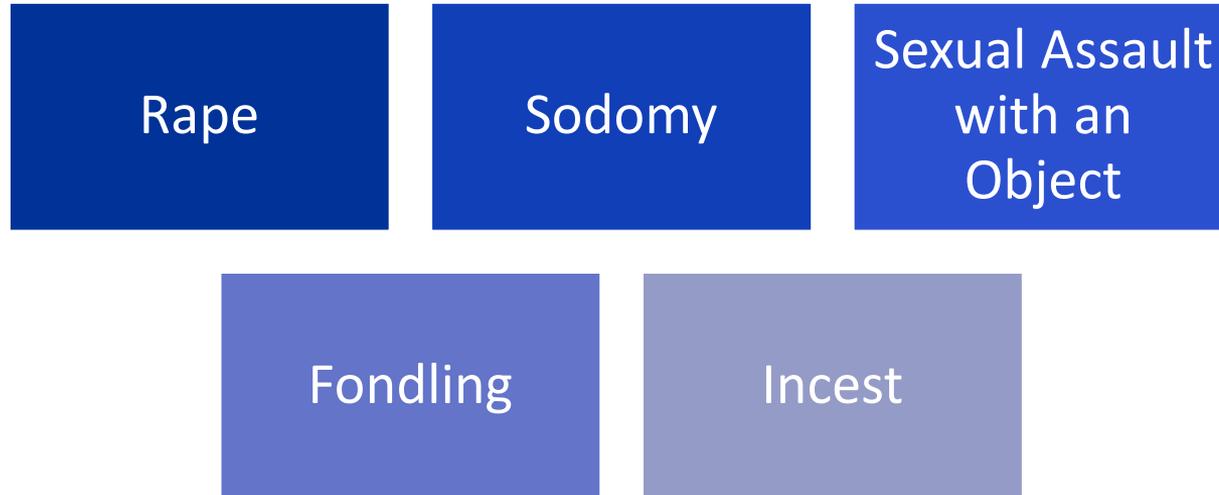
—
Vocal student actively supports a prominent political candidate who has been accused of sexually harassing campaign staffers. Offended student files a complaint that Vocal student's political support of the candidate has caused a sexually hostile environment on campus.





What is sexual assault?

Title IX regulations define “sexual assault” as incorporating the following classes of conduct:





What is rape?

Having carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. There is “carnal knowledge” if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted rape is included.



What is consent?

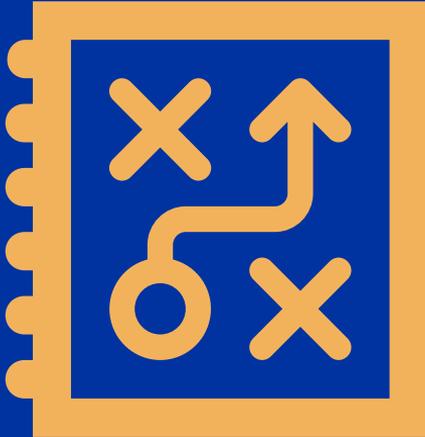
- An agreement expressed through affirmative, voluntary words or actions, and mutually understandable to all parties involved, to engage in a specific sexual act at a specific time.
- Consent can be withdrawn at any time, as long as it is clearly communicated
- Consent cannot be:
 - Coerced or compelled by force, threat, deception or intimidation
 - Given by someone who is incapacitated
 - Assumed based on silence, the absence of “no” or “stop,” the existence of a prior or current relationship, or prior sexual activity



What is incapacitation?

- An individual is incapable of consent if they are unable to understand the facts, nature, extent, or implications of the situation due to drugs, alcohol, a mental disability, being asleep or unconscious, or based on their age (pursuant to Indiana law).
- Intoxication and/or impairment due to drugs or alcohol is not presumptively equivalent to incapacitation.
- Consent does not exist when the individual initiating the sexual activity knew or should have known of the other individual's incapacitation.

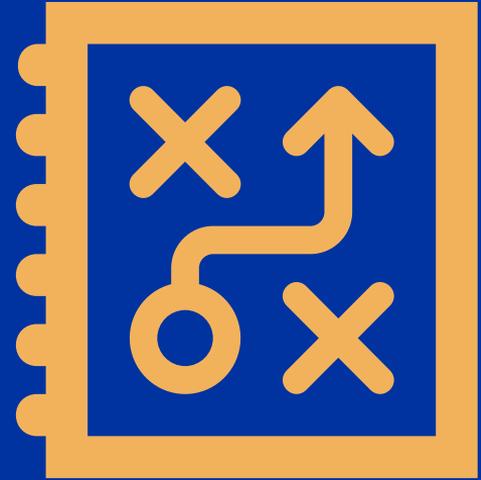
Example: Incapacitated



Short student has had ten cocktails over the course of two hours. Sober student takes Short student to Sober's apartment. Short student cannot walk without support, forgets Sober's name, and passes into a stupor when Sober places Short student on Sober's bed. Sober then engages in sexual activity with Short student.

Example: Not-Incapacitated

Tall student had four beers over the course of two hours with dinner. Tall student calls Friend to see if Friend is home. Tall student then drives from campus to Friend's off-campus apartment. Upon arriving, Tall student initiates sexual contact with Friend, and then insists that Friend uses contraception before the two have intercourse. Tall student is an active participant in the intercourse.





What is sodomy?

- Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the victim is incapable of giving consent because of age or temporary or permanent mental or physical incapacitation.



What is sexual assault with an object?

IU Updated Policy

To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



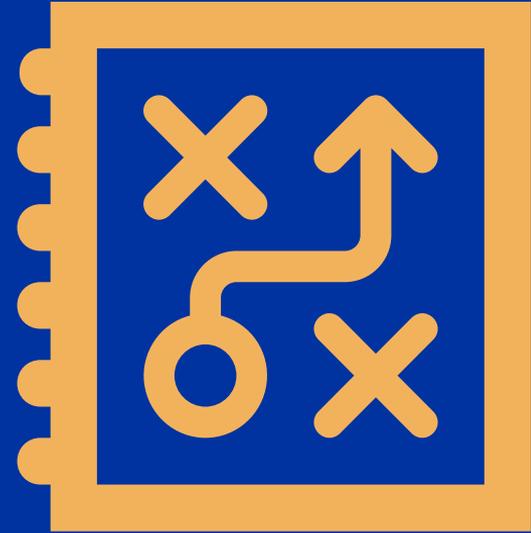
What is fondling?

IU Updated Policy

The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly against the person's will in instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Example: Fondling

Clumsy student and Dance student attend a dance held in the student union. While on the dance floor, Clumsy gropes Dancer's groin without permission. Dancer does not welcome the groping and views it as unwelcome.





What is incest?

IU Updated Policy

Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Indiana law (more closely related than second cousins).

Poll question

- What is the age under which no one is considered able to consent to sexual activity in your state?

What is statutory rape?

IU Updated Policy



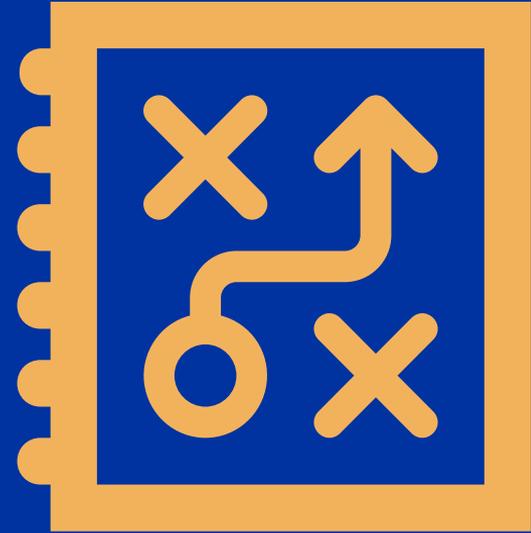
Nonforcible sexual intercourse with a person who is under the statutory age of consent under Indiana law (16).

What is dating violence?

Violence or the threat of violence committed by any individual who is or has been in a relationship of a romantic or intimate nature with the victim. The existence of such a relationship will be determined based on a consideration of the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

Example of dating violence

President's Chief of Staff and Statistics Department Chair are engaged to be married but live separately and have no children in common. Chief of Staff and Department Chair get into an argument over sex in Chief of Staff's car in the institution's parking lot. During the argument, Chief of Staff slaps Department Chair's face and tells chair to "shut your mouth."





What is domestic violence?

IU Updated Policy

Violence committed which would constitute a felony or misdemeanor crime of violence under criminal law by:

- A current or former spouse or intimate partner of the victim;
- A person with whom the victim shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic or family violence laws of Indiana; or
- Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of Indiana



What is stalking?

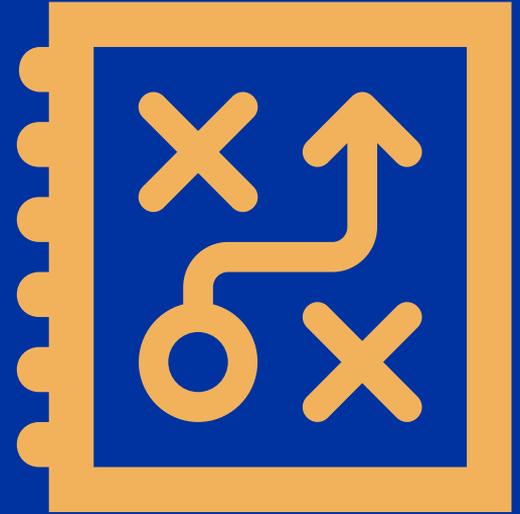
IU Updated Policy

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others; or
- Suffer substantial emotional distress

Example: Stalking

Freshman is infatuated with Sophomore who has rebuffed Freshman's romantic advances. Thereafter, Freshman dresses in black and sneaks up to the window of Sophomore's house (owned by sponsored Student Organization) at night in an attempt to see Sophomore. Freshman does this twice before being caught in the act during Freshman's third attempt.





Does Title IX also prohibit retaliation?

Yes – “No recipient or other person may intimidate, threaten, coerce, or discriminate against any *individual* for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing” under the institution’s policy

(34 C.F.R. § 106.71)



Protections at IU

- Retaliation against anyone who has reported an incident of discrimination, harassment and/or sexual misconduct, provided information, or participated in procedures or an investigation into a report of discrimination, harassment and/or sexual misconduct, is prohibited by the university and may be considered and addressed as a potential violation of this policy or other applicable university policies



What are acts of retaliation?

- Acts of retaliation include intimidation, threats, and/or harassment, whether physical or communicated verbally or via written communication (including e-mail, text, and social media), as well as adverse changes in work or academic environments, or other adverse actions or threats.

Retaliation



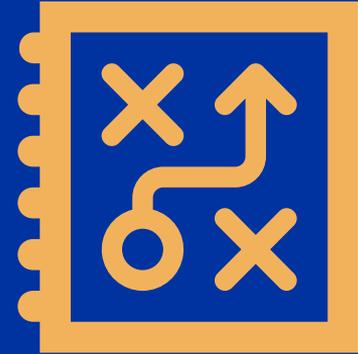


University Response

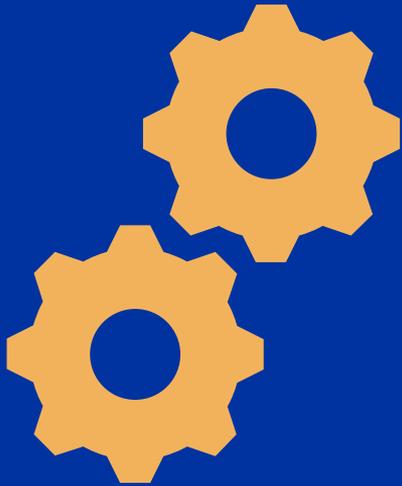
- The university will take steps to prevent retaliation and will impose sanctions on anyone or any group who is found to have engaged in retaliation in violation of this policy. Concerns about potential retaliation in connection with a report of sexual misconduct should be reported to the designated officials under this policy.

Example of retaliation

Groundskeeper testifies at hearing in support of Office Worker's complaint of sexual harassment against Manager. After institution finds that Manager sexually harassed Office Worker, Manager demotes Groundskeeper to punish Groundskeeper for testifying against Manager.



Group Scenario



Complainant reports that Respondent sexually harassed Complainant on two occasions. The first incident consisted of Respondent groping Complainant's genitals without permission while the two were dancing at a local bar that had been rented out for a student event. The second incident consisted of Respondent attempting to have sexual intercourse with Complainant one week later, when Complainant was intoxicated after studying and drinking at Respondent's apartment with their study joint group.

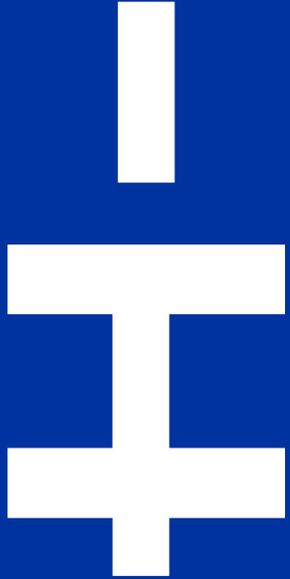


QUESTIONS

- Does Title IX jurisdiction extend to the first incident? What questions do you need to ask?
- What about the second incident? What questions do you need to ask?
- What potential forms of sexual harassment might these incidents be classified as?

Questions





HUSCH BLACKWELL

**Module 3:
Bias, Stereotyping,
Conflicts of Interest,
and Trauma**



Poll question

Who is responsible for identifying conflicts of interest?

- Title IX Coordinator
- Parties
- Those acting on behalf of the institution in the Title IX process
- All of the above



Who is responsible for identifying conflicts of interest and bias?

- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias
- Individual institutional actors should self-police conflicts of interest and self-identify bias

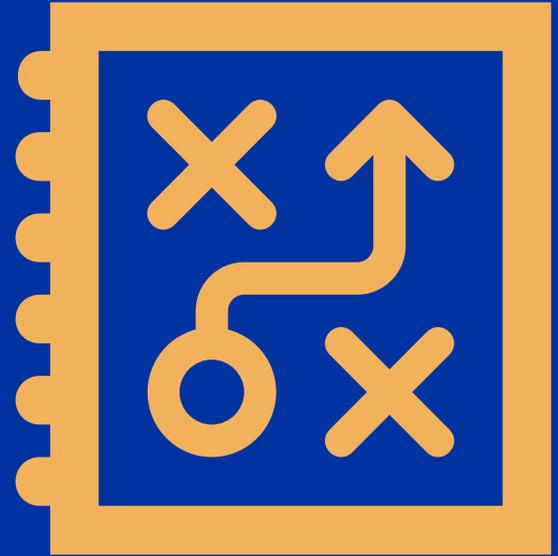


What is a conflict of interest?

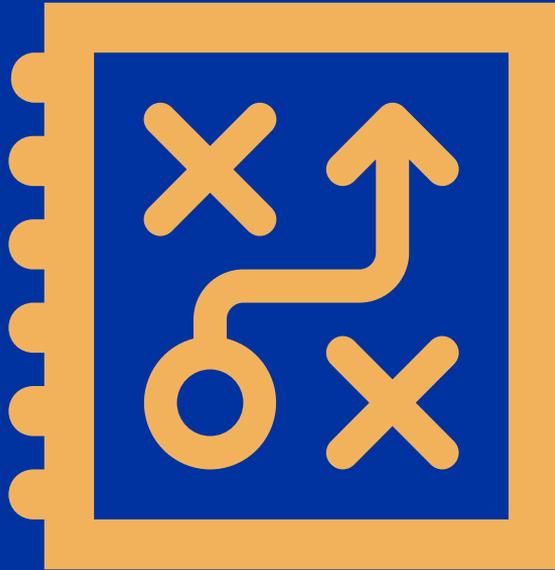
- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position

Example: Conflict of interest

Student Math files a formal complaint of sexual harassment against Student Chemistry. One of the hearing panel members selected is Student Chemistry's faculty advisor who has previously written letters of recommendation for Student Chemistry's application to graduate school in which faculty advisor wrote that Student Chemistry is "honest to a fault."



Example: Conflict of interest



An administrator accuses an employee of an office supply vendor of sexual harassment; matter is investigated. Institution assigns a hearing panel member whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.

Examples of impermissible stereotypes

“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

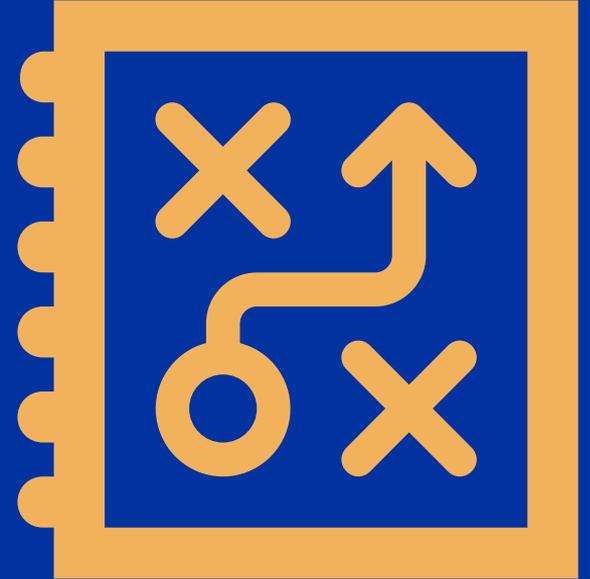
“Students can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape. Therefore, every complainant must be believed.”

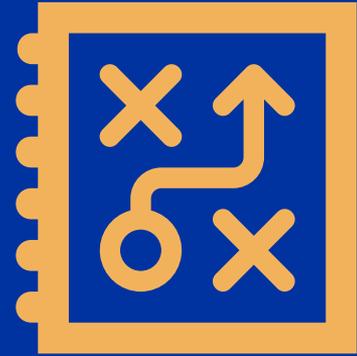
Example: Bias

An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."



Example: Bias

Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.” Investigator tells a co-investigator: “I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”

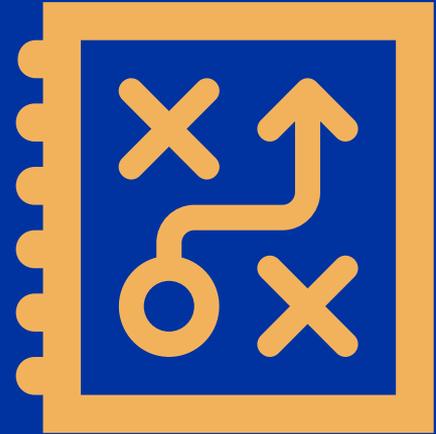


For Discussion



Do the following circumstances or relationships constitute conflicts of interest?

- Respondent faculty member and the hearing officer previously disagreed about a curriculum matter
- Complainant is currently a student in a hearing panel member's class
- Respondent is a staff member in the Title IX Coordinator's office





Resource for consideration: Harvard Implicit Bias Test

<https://implicit.harvard.edu/implicit/takeatest.html>



What is the definition of trauma?



Merriam-Webster: A very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



English Oxford: Deeply distressing or disturbing experience



Wikipedia: Is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience

What is trauma's impact on the brain?



- Brain senses threat and sets off alarm
- Thinking brain assesses
- Thinking brain shuts down
- Emotional brain
 - Fight, flight, freeze
- Thinking brain comes back online, turns off alarm, helps calm down
- Emotional brain may continue to sound the alarm, and overwhelming the system going forward



How do we approach trauma in a Title IX case?

- Balance
 - “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”
 - Candace Jackson, Acting Asst. Secretary of ED (2017)



When does trauma affect a person?

- Not in every case
- Never *assume* anyone participating has suffered any trauma
- Trauma may arise before, during, or after alleged Title IX misconduct, and may impact an individual's response during proceedings
- Not just complainant

Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following:

Flashbacks

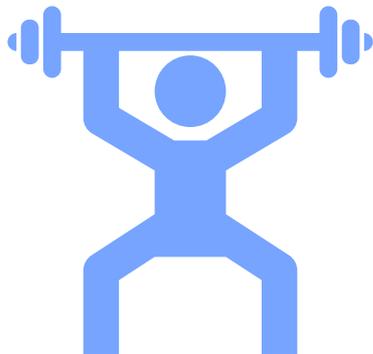
Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame

Physical reaction



- Brain—Trauma triggers chemical reaction which impacts
 - Perception
 - Ability to React
 - Memory
- Everyone reacts differently



Trauma-informed Interviews

- Provide information to the individual
- Acknowledge the difficult situation
- Describe the process
 - Your role
 - Policy
 - Communication
- Avoid requiring recitation of information already provided, if possible

Investigating & Trauma

- Avoid judgment, impatience, disrespect, misuse of power
- Emphasize
 - Safety/comfort
 - Choices
 - Support for person
 - Personal support
 - Available services
 - Remain objective on facts
 - Trustworthiness/transparency

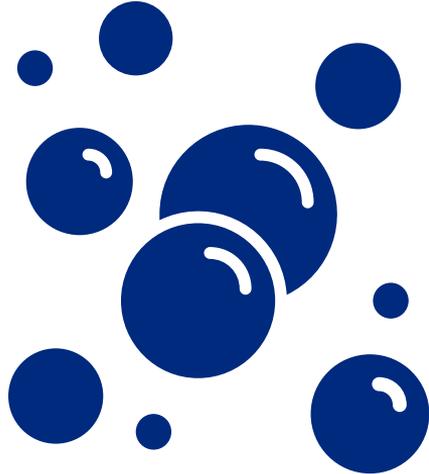




Trauma-informed Interviews (cont.)

- Important to focus on two concepts:
- What are you *able* to tell me about your *experience*?
 - Allow individual to begin where they want
 - Allow an uninterrupted statement
 - Use follow-up questions (non-leading)

Trauma-informed Interviews (cont.)



- Instead of asking “why,” ask about what witness was thinking during the experience
- Consider asking about memories associated with the senses:
 - Sights
 - Smells
 - Feelings

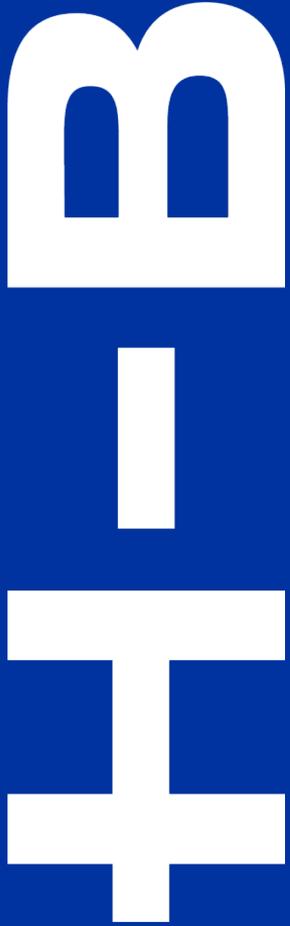


Trauma & Credibility

- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time
- Address inconsistencies
- Ascertain fair and impartial assessment of the facts and give appropriate weight to party and witness statements

Questions





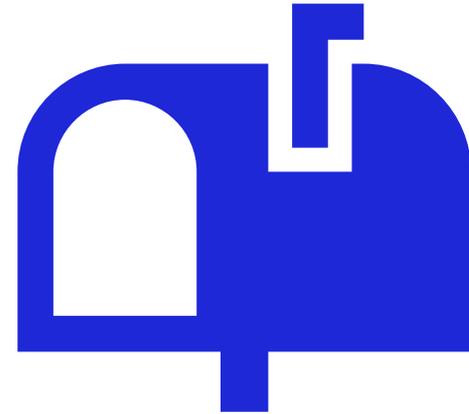
HUSCH BLACKWELL

**Module 4:
Resolution Options
and Case Processing**



How does an institution get notice of sexual harassment?

—
Sexual harassment response is triggered when institution has “actual knowledge” of potential sexual harassment.





What is “Actual Knowledge”?

“Actual knowledge” occurs when

- An institutional official, with authority to take corrective action
- Observes or receives a report
- Of sexual harassment occurring in the institution’s education programs and activities



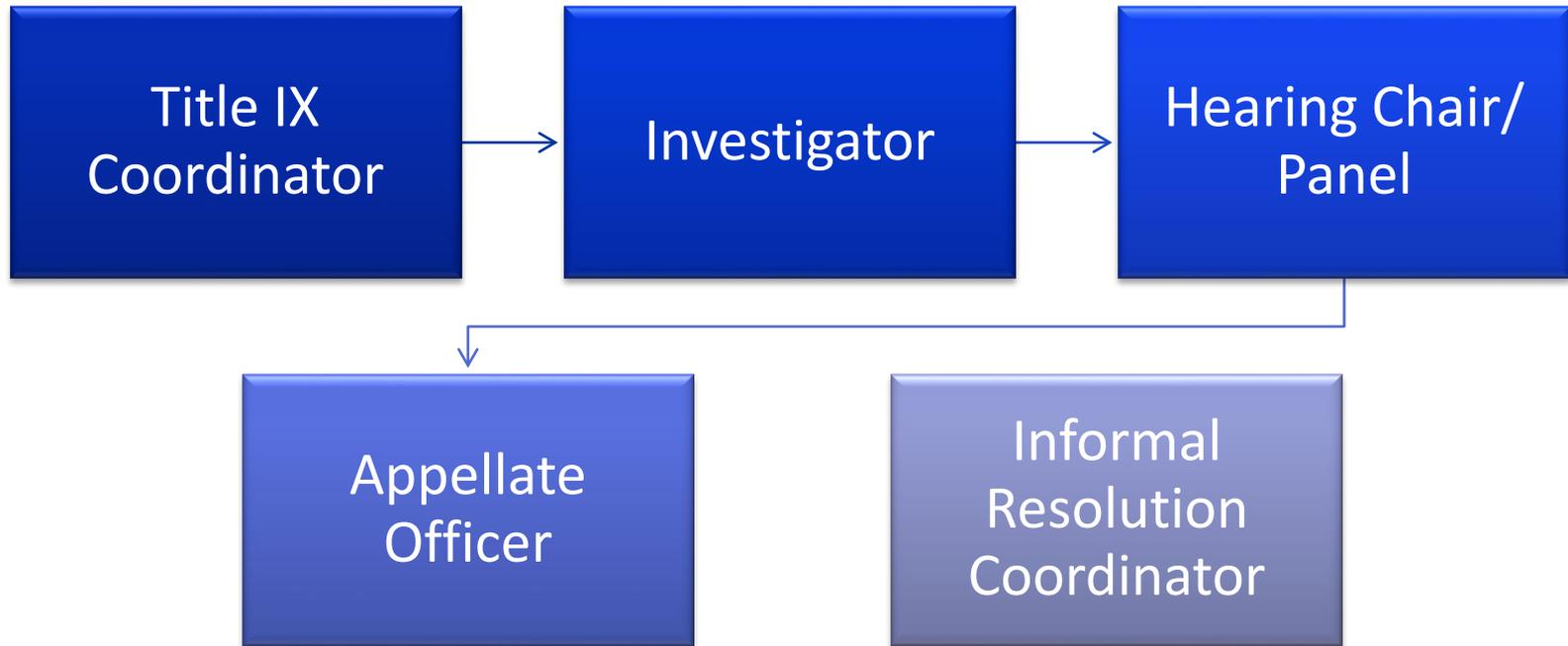
Making Reports

- What?
 - Observed sexual misconduct
 - Sexual misconduct reported to a mandatory reporter
- How?
 - To Title IX Coordinator/Deputy
- When?
 - ASAP

What are the institution's overall duties?



Who are the key institutional actors in the grievance process?



What is the resolution process?

Report

Initial
Assessment/
Supportive
Measures

Formal
Complaint

Possible
Informal
Resolution
(not
employee-
on-
student)

Investigation
to collect
relevant
inculpatory
and
exculpatory
evidence

Live Hearing
before a
decision-maker
who finds facts
under an
evidentiary
standard and
determines the
existence (or
not) of a policy
violation and
any resulting
sanctions/
remediation

Appeal

What is a formal complaint?

What

- Document
- Alleging sexual harassment
- Requesting an investigation / resolution under grievance procedures

Who

- Signed by
 - Alleged victim or
 - The Title IX Coordinator
- If filed by alleged victim, alleged victim must be current or attempted participant in education programs and activities
- Third-parties may not file formal complaints on behalf of an alleged victim

How

- Either physical or electronic submission



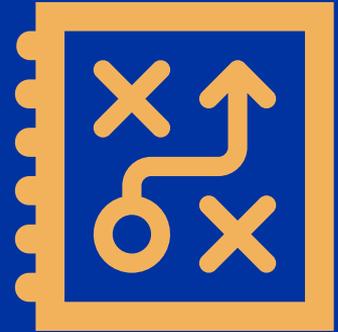
When may the Title IX Coordinator file a formal complaint?

- Typically, when there is an important institutional interest in adjudicating a report irrespective of the alleged victim's wishes
- Typically involves serious misconduct, repeated misconduct, or misconduct by employees
- If alleged victim does not wish to file a formal complaint, Title IX Coordinator's decision to do so must not be clearly unreasonable

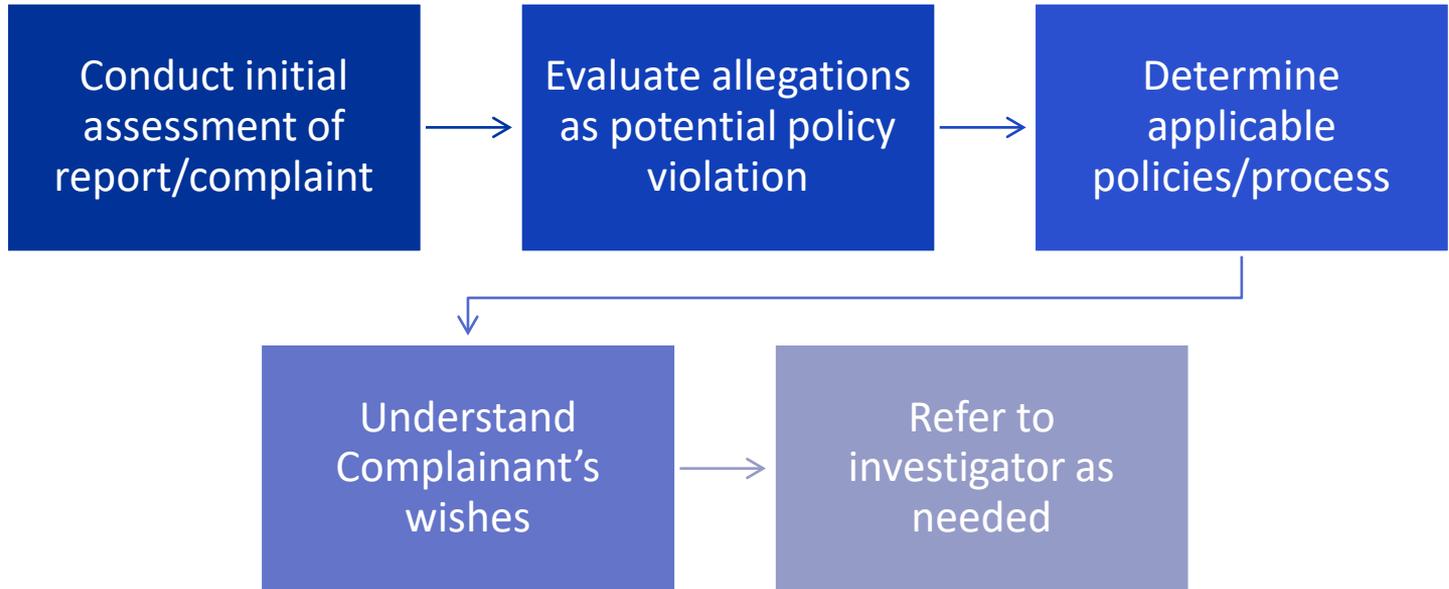


Example of Title IX Coordinator formal complaint

Two female students, who do not know one another, each separately report they were sexually assaulted by a male student. Both female students suspect they were drugged. Neither female student wishes to file a formal complaint, but each has indicated they will cooperate with an investigation if the Title IX Coordinator files a formal complaint.



Intake process





When *must* we dismiss a formal complaint?

- If filed by the alleged victim, and the alleged victim is not a current or attempted participant in education programs and activities
- Complaint does not allege sexual harassment in the institution's education programs or activities
- Complaint alleges sexual harassment abroad
- Conduct alleged would not amount to sexual harassment even if it occurred as reported
- *Practice point – duty*



When *may* we dismiss a formal complaint?

- Alleged victim indicates in writing a desire to withdraw the complaint (or particular allegations)
- Respondent is no longer enrolled in or employed by the institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

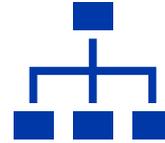


Initial Assessment

- If the report raises allegations that on their face do not rise to the level of a policy violation, but does indicate a matter of concern, the Investigator shall work... to address the concern through other appropriate avenues.
- If a complaint raises allegations that are outside the scope of the policy but may violate other university policy(ies)... [IU] will refer the complaint to the appropriate University office.

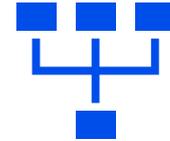
Can we consolidate the complaints?

Yes – Complaints can be consolidated if they arise out of the same facts and circumstances

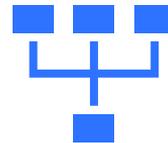


Multiple respondents

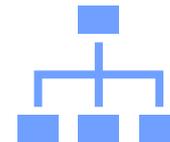
Multiple complainants



Multiple allegations against a single respondent

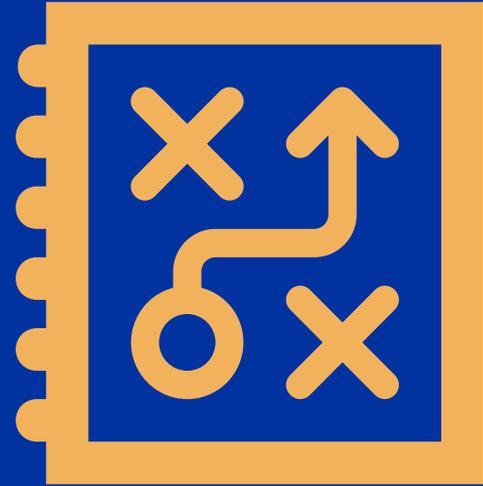


Multiple allegations from a single complainant



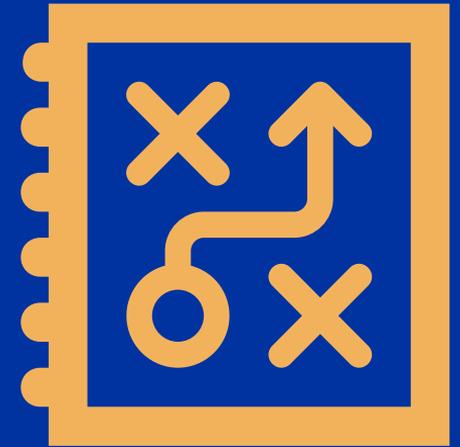
Example of permissible consolidation

Students A and Student B, who are roommates, allege that Student C barged into their apartment drunk and propositioned them for sex. Student A and Student B each file their own formal complaint of sexual harassment from the same incident.



Example of impermissible consolidation

Graduate files a formal complaint that Research Fellow sexually assaulted Graduate two years ago when Graduate was incapacitated by drugs taken to treat a back injury. Undergraduate, Fellow's present romantic partner, files a formal complaint that Fellow committed dating violence by slapping Undergraduate during an argument a month ago.





Poll question

The Title IX Coordinator can begin investigating to determine details in preparing the written notice.

- True
- False



What is the purpose of a Title IX investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine through a live hearing
- Whether or not the reported sexual harassment occurred



How do we tell the parties about an investigation?

- Institution must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how” before investigating



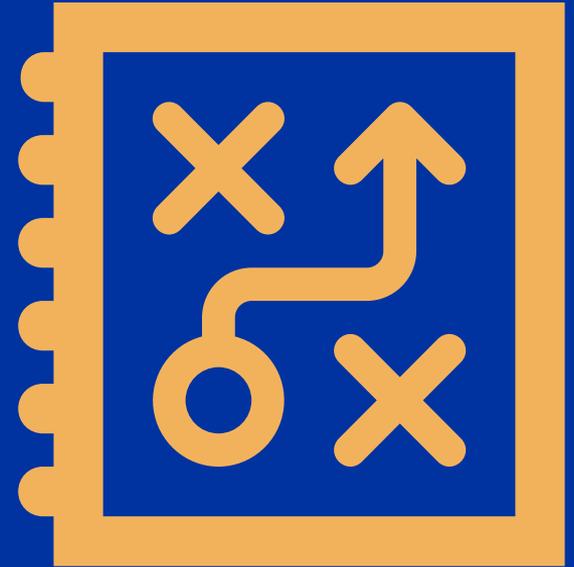


What else does the notice need to say?

- Written notice must also include:
 - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
 - That parties have the right to an advisor of their choice
 - That parties have the right to inspect and review evidence
 - Any prohibition on providing knowingly false statements or information

Example: Incorrect

Student accuses Employee of quid pro quo harassment. Prior to sending written notice, Title IX Coordinator appoints investigator who schedules interviews with Employee's co-workers. Only after these interviews are complete, does the investigator send a written notice to Employee.

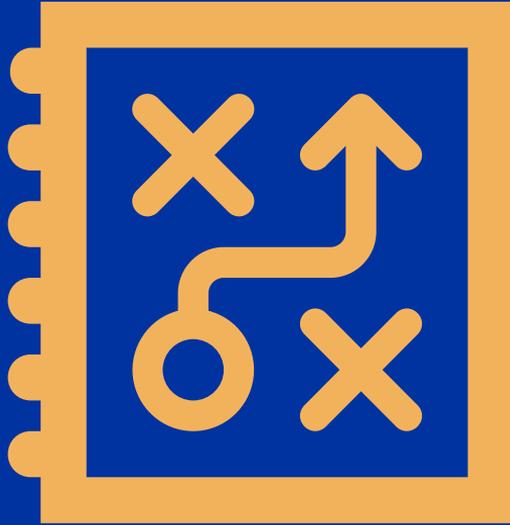




Can we gather any information prior to the written notice?

- Yes – But only to the extent necessary to determine how the case will proceed
- Typically, this “preliminary inquiry” would involve identifying the putative victim and understanding the scope of the allegations
- Information gathering that seeks to determine whether the allegations are true is investigatory and should await the written notice

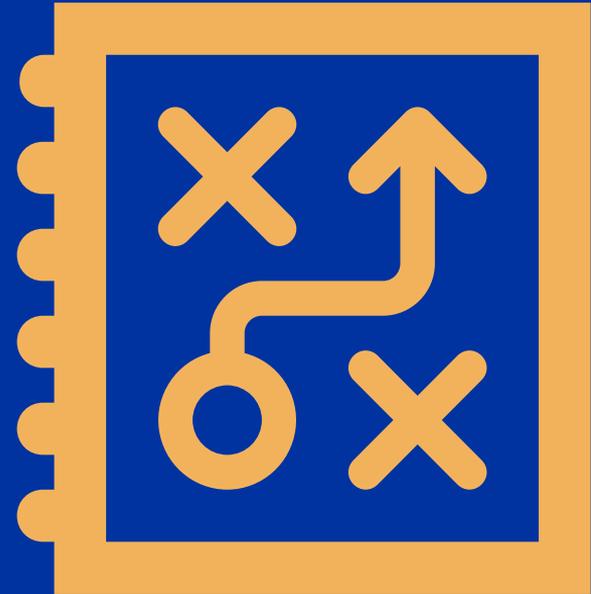
Example: Preliminary inquiry



Student submits formal complaint via email with a single sentence reading, “Named Student sexually assaulted me.” Prior to sending a written notice, investigator meets with the complainant and asks for more specific information about what happened—the “who, what, when, where, and how.”

Example: Preliminary inquiry

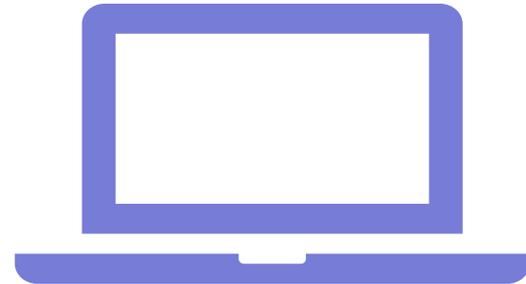
Campus visitor reports that Student was sexually assaulted by another student. Investigator sends email to Student seeking to meet with Student to understand what happened and how Student wishes to proceed.





May we take steps to preserve information before sending the written notice?

- Yes – If the work isn't investigatory and there is a legitimate concern information will be lost
 - Placing a “hold” on an email account
 - Asking IT to capture server-level data
 - Having campus security suspend auto-delete of security footage



Questions



What is informal resolution?

A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.



Types of informal resolution

Mediation

**Facilitated
discussions led by
Title IX
Coordinator**

Restorative justice

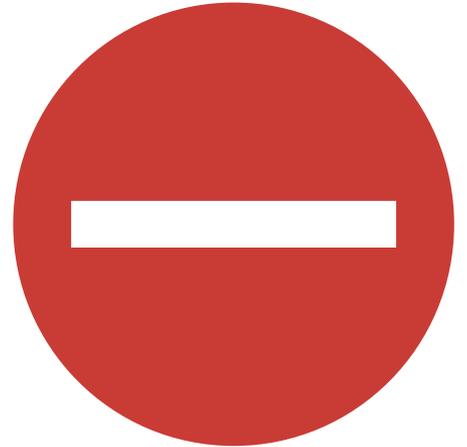
**Attorneys for
parties negotiate
an agreement**

**Arbitration
without a live
hearing**



What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment



Questions



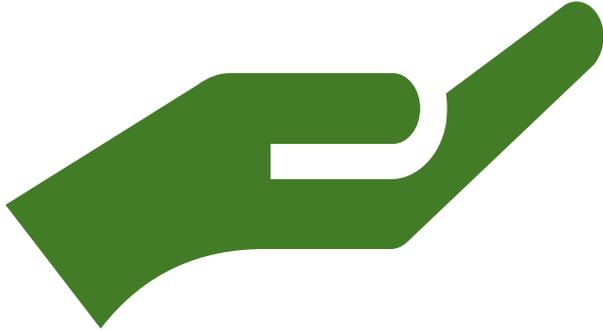


Supportive measures

- Must be offered to an alleged victim once an institution has actual knowledge of potential harassment
 - Must be offered also to respondent once a formal complaint is filed
 - Ambiguity as to whether support services must be offered to respondent before formal complaint is filed
 - Non-disciplinary in nature; non-disciplinary measures only until end of investigation and grievance process
 - Title IX Coordinator has responsibility to oversee offering and implementation



What are supportive measures?



- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party

Examples of supportive measures

 Counseling

 Academic accommodations

 Housing accommodations

 Security escorts or transportation arrangements

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order where implicated by facts



Examples of Supportive Measures under IU's Policy

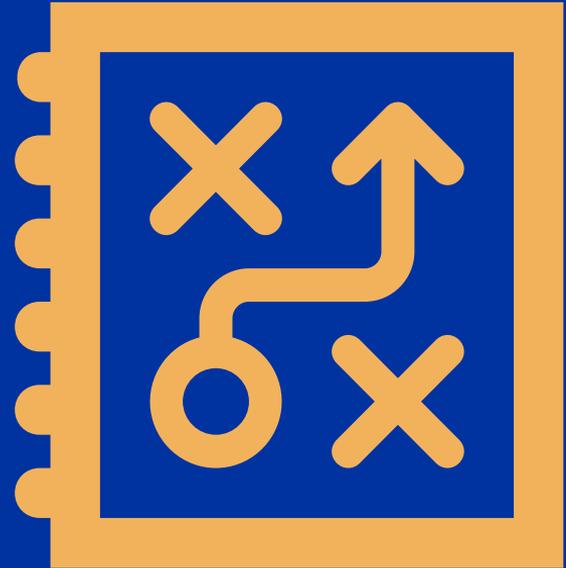
IU Updated Policy

- Supportive measures may vary with the Complainant's campus, needs, and circumstances.
- Supportive measures may include:
 - assistance in changing academic, living, transportation or work situations
 - Counseling services
 - Advocacy and advising services
 - Assistance in obtaining protective orders

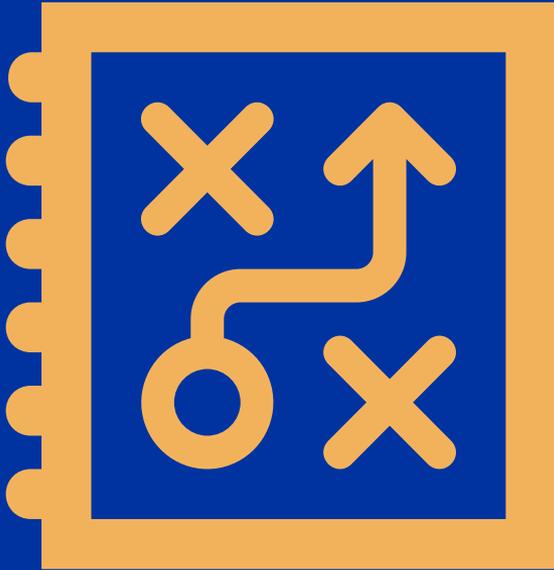


Example: Reasonable supportive measure

History student in History 101 reports that another student, also in History 101, sexually assaulted History student two weeks ago. History student is uncertain whether to file a formal complaint but wants assistance transferring to a different section of History 101.



Example: Unreasonable supportive measure



Employee in maintenance department accuses supervisor of sexual harassment by way of making sexualized jokes and remarks. Employee requests to be on indefinite paid leave for the remaining six months of the academic year. Employee could easily be reassigned to work under a different supervisor in a different part of campus.



Poll question

Can supportive measures affect the respondent?

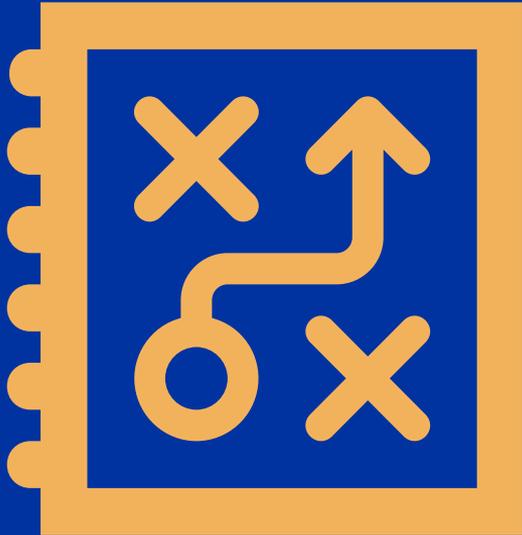
- Yes
- No
- It depends



Can supportive measures affect the respondent?

- **Yes**, but cannot create an unreasonable burden
- Cannot be a form of *de facto* discipline
- Supportive measures are not a substitute for the investigation and hearing process

Example: Unreasonable burden

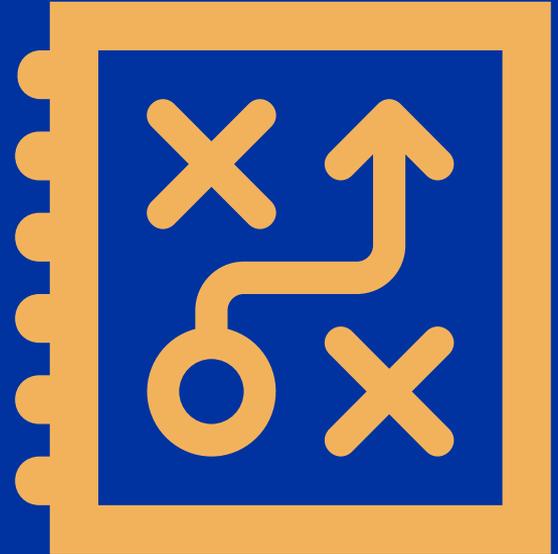


Student Worker accuses Colleague of sexual harassment. Institution imposes proximity restriction that prohibits Worker and Colleague from being within 200 meters of each other pending investigation and hearing.



Example: Disciplinary supportive measure

In-State Student accuses Out-of-State Student of sexual assault. In-State requests as a support measure that Out-of-State be removed from all shared classes and prohibited from being on campus after 5:00 pm.



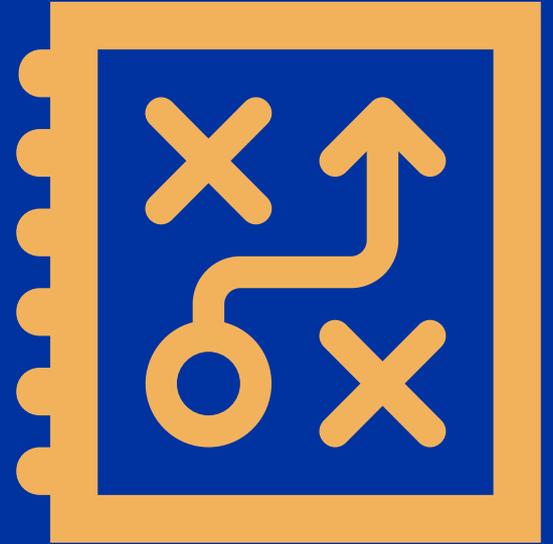


Can we use interim removals or suspensions for students?

- *Students* may be removed on emergency basis if:
 - Individualized safety and risk analysis
 - Determines an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
 - Student is given immediate notice and opportunity to contest the removal

Example: Immediate threat to physical health or safety

Mechanic Student is reported to have raped Tech Student after providing Tech with a large quantity of heroin. Tech explains that Mechanic keeps heroin in Mechanic's campus locker and is known to sell it to others. Tech explains that at least one other student has been sexually assaulted by Mechanic using this method.





Interim Removal Considerations

- Under the IU Policy, depending on the nature of allegations and circumstances, the Respondent may be suspended from campus or some portion of campus.
- Interim suspension procedures to be followed.



Can we use an already existing process for interim removals?

- Yes – If that process complies with the Title IX standard
- Common institutional examples include:
 - Threat assessment policy
 - Incident response team processes
 - Interim suspension provisions of Student Handbook

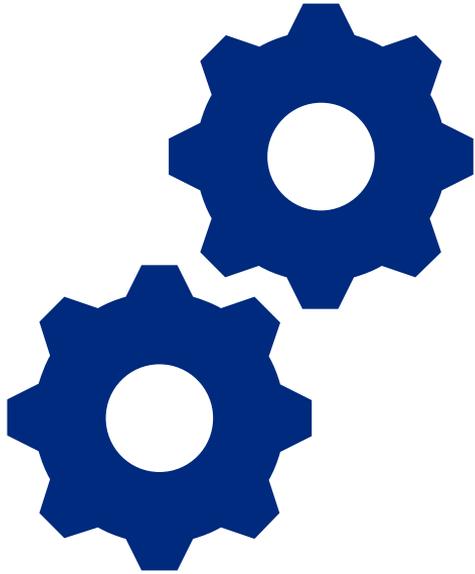


Can we place employees on administrative leave?

- Yes – *Employee* respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (e.g., Faculty Handbook)



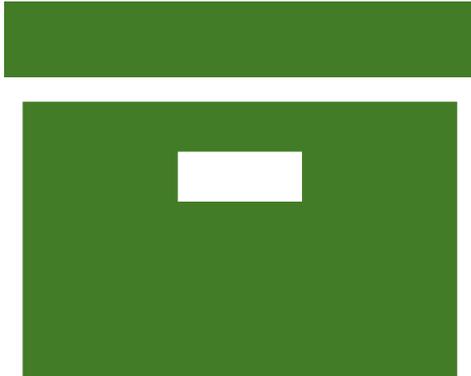
Do students and employees have other rights?



- Yes – Other laws may trigger accommodations when a medical condition or disability is present
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act



Are supportive measures confidential?



- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with institutional employees who have a legitimate need to know

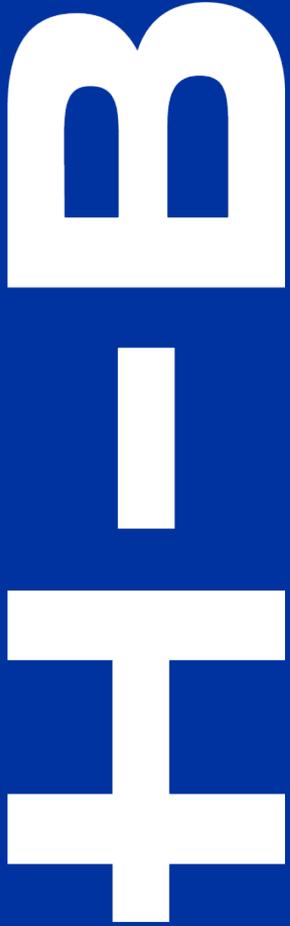


Who is responsible for supportive measures?

- Title IX Coordinator is responsible for coordinating the effective implementation
- May be delegated with appropriate oversight
- Typically, a collaborative effort involving more than one institutional office or department

Questions





HUSCH BLACKWELL

**Module 5:
Addressing Other
Misconduct**



Can other policies apply if sexual misconduct falls outside Title IX?

- Yes, institutions are free to regulate sexual misconduct that falls outside the scope of Title IX through other policies:
 - Student codes of conduct
 - Faculty handbooks
 - Staff handbooks
 - Policies implementing other laws, such as Title VII



Examples of Policies with Related Concepts

Discrimination

- Sexual harassment
- Other non-discrimination statement & policies

Relationships

- Workplace
- Employee - student

Conduct

- Student
- Faculty/Employee

Discipline

- Student
- Faculty
- Employee

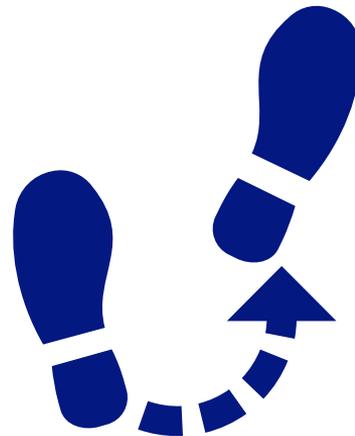
Poll question

- May we use another process before Title IX?
 - Yes
 - No



May we use another process before Title IX?

- Yes
- Some processes do not require a formal complaint and may be initiated prior to Title IX
- Other policy violations may be apparent prior to Title IX

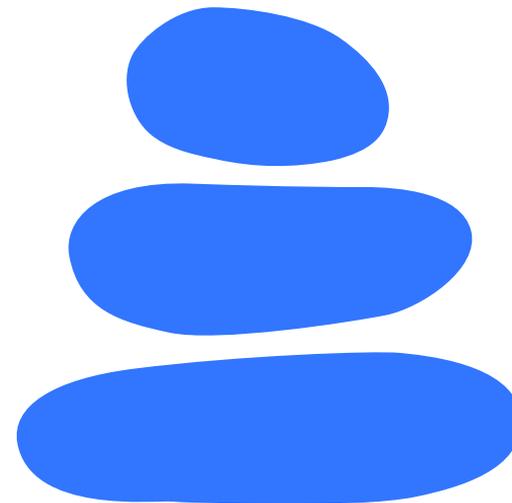




May we use another process after Title IX?



- Yes
- Some conduct may not violate Title IX standards but will violate other standards
- Some conduct may merit additional punishment beyond what is merited by Title IX policy

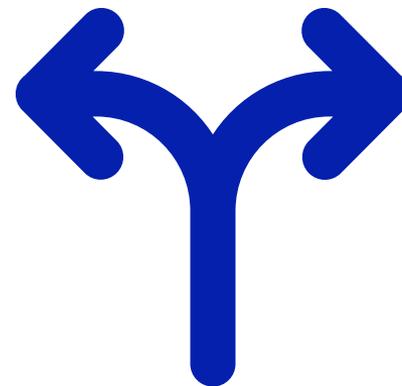




May we use two processes at the same time?



- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ



Can we use another process to make the same finding we would otherwise make under Title IX policy?

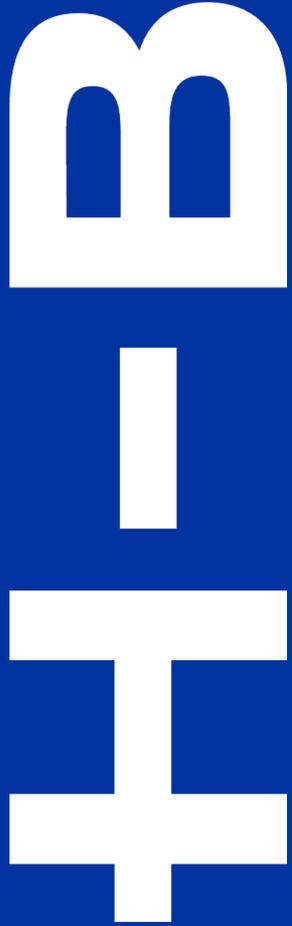
- No
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” that occurs in institution’s programs and activities





Student code of conduct / employee standards

- Conduct outside of the purview of Title IX policy
- Examples:
 - General bullying
 - Uncivil behavior
 - Harassment based on membership in a protected class



HUSCH BLACKWELL

**Module 6:
Relationship Between
Title VII and Title IX**

—



Understand Title IX and Title VII Procedures

- Current Title IX Regulations -- Employees
 - Impose additional procedural requirements
 - Only for allegations meeting new sexual harassment definition
 - Expressly contemplate “dual” compliance approach with Title IX and Title VII

How do Title IX and Title VII standards compare? (*enforcement standard*)

“Neither Federal non-sex discrimination civil rights law represents a ‘zero-tolerance’ policy banning all sexual harassment.” – Preamble to 2020 Title IX Regulations

Title VII Sexual Harassment

Quid pro quo

Sufficiently severe or pervasive

Title IX Sexual Harassment

Any quid pro quo by employee

Unwelcome and Sufficiently severe and pervasive and objectively offensive

Any sexual assault/DV /stalking

Title VII Sexual Harassment Standard

Hostile environment

Unwelcome
subjectively and
objectively

“severe OR
pervasive”

Similar conduct at
issue under Title IX

Quid Pro Quo

Sexual Violence
(e.g. assault)



How should we treat alleged conduct that may violate Title IX and Title VII policies?

“The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer’s obligations under Title VII and Title IX.”

— Preamble to 2020 Title IX Regulations (also 34 C.F.R. § 106.6(f))



More From Preamble

- “These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in § 106.30, under the recipient’s own code of conduct, as these final regulations apply only to sexual harassment as defined in § 106.30.”
- “These final regulations do not preclude a recipients’ obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations.”

- Preamble to 2020 Title IX Regulations (also 34 C.F.R. § 106.6(f))

Example of typical “Title VII” process

Complaint to manager, HR,
ethics line, etc.

HR/manager
collaborate to provide
information to parties,
investigate, and
resolve

HR/manager take any
appropriate corrective
and preventive action,
and protect against
retaliation

Comparison

Common Title VII Response

Resolution by internal investigation

Formal or informal complaint

Advisor silent supporter

Resolution does not require active complainant

May or may not result in formal report

Title IX Regs Requirements

Discipline requires regimented investigation & hearing process

Formal complaint only

Advisor entitled to participate

Need participating complainant

Requires formal report & other documentation



What triggers an employer's liability for sexual harassment under Title VII?

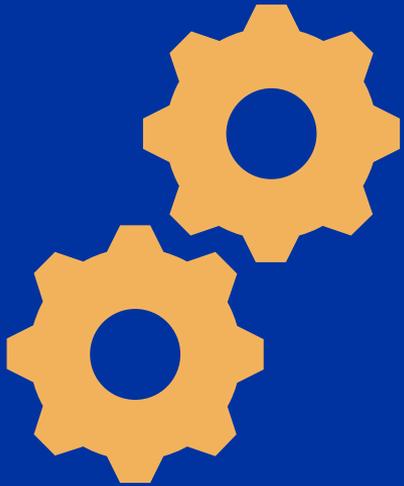
- ✓ An employer, its agent, or its supervisor
- ✓ Knew or should have known
- ✓ About severe **OR** pervasive sexual harassment
- ✓ That a reasonable person would consider intimidating, hostile, or abusive
- ✓ By an employee or non-employee over which it has control and
- ✓ Failed to take appropriate corrective action

- U.S. Equal Employment Opportunity Commission, *Harassment* (<https://www.eeoc.gov/harassment>)

What Triggers Obligations for VII vs. IX?



Group Scenario

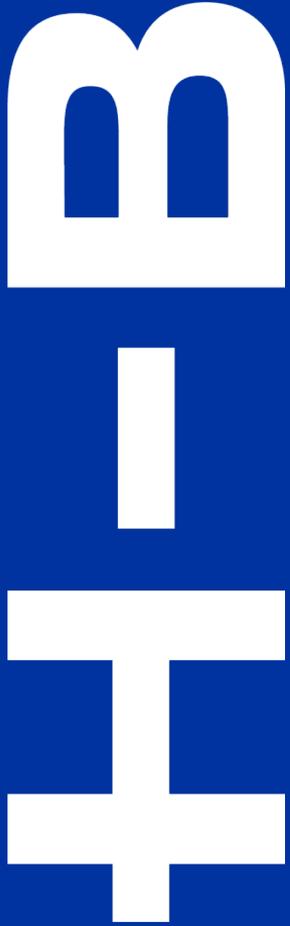


Employee A reports that Employee B sexually harassed Employee A by installing a program on Employee A's computer that caused pornography to play when Employee A logged on. This occurred only once, after which Employee A had the program removed from Employee A's computer. Employee A makes a formal complaint under the institution's Title IX sexual harassment policy.



QUESTIONS

- What other policies might be implicated by this report?
- Would the institution have an obligation to take action in the absence of a formal complaint?
- Will this constitute sexual harassment under Title IX? What about under some other standard?



HUSCH BLACKWELL

**Module 7:
Transgender Legal
Considerations**



OCR Response to Inquiry (March 9, 2020)

“By itself, refusing to use transgender students’ preferred pronouns is not a violation of Title IX and would not trigger a loss of funding or other sanctions. To the extent any prior OCR subregulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative.

However, sex-based harassment, including that predicated on sex stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity. Thus, harassing a student-including acts of verbal, nonverbal, or physical aggression, intimidation, or hostility-based on the student's failure to conform to stereotypical notions of masculinity and femininity can constitute discrimination on the basis of sex under Title IX in certain circumstances. Schools have a responsibility to protect students against such harassment.”



EEOC FAQ (June 15, 2021)

Q.11. Could use of pronouns or names that are inconsistent with an individual's gender identity be considered harassment?

Answer: Yes, in certain circumstances. Unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*, the Commission explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.



Meriwether v. Hartop (6th Cir. 2021)

- Institution adopts mandatory preferred pronouns policy
- Faculty member wishes to refer to transgender students by last name instead of preferred honorific or pronouns
- Institution finds faculty member engaged in hostile environment harassment and/or adverse treatment discrimination
- Faculty member files lawsuit asserting free speech, freedom of religion, and due process claims



Meriwether v. Hartop (6th Cir. 2021)

- Faculty member's claims survive a motion to dismiss
- Court says: “there is no suggestion [faculty] member’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits.”
- “[Faculty member’s] decision not to refer to Doe using feminine pronouns did not have a [systematic effect of denying the victim equal access to an education program or activity].”



Flaming v. West Point School Board, (E.D. Va. 2021)

- Teacher fired after not using he/him pronouns for a student who was assigned female at birth.
- Teacher avoided using pronouns, called student by preferred name. Sometimes referred to student using female pronouns when student was not in the room.
- Dismissed all claims other than breach of contract regarding procedures surrounding termination



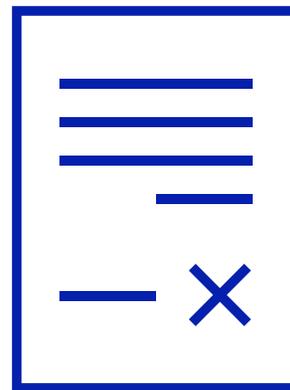
Takeaways

- Misgendering or failure to use preferred names is not inherently discrimination as defined by law (but may be)
- Faculty members have First Amendment academic freedom rights that limit institutional ability to compel language
- Faculty members with religious beliefs may be entitled to an accommodation (more on that later)



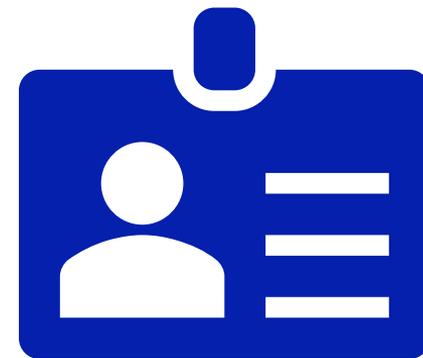
Pronoun best practices

- Allow students to use preferred pronouns
- Avoid gendered language when possible
- Encourage students to use pronouns on signature lines in email
- Develop a pronoun policy



Name change best practices

- Ask students what their preferred names are
 - Legal name changes not required
- Develop a name change policy





Bathroom choice

- “Bathroom bans” – rules and laws that restrict which bathrooms transgender individuals are allowed to use
- State legislation to limit individuals using a bathroom that does not correspond with their gender on their birth certificate



Whitaker v. Kenosha Unified School Dist. (7th Cir. 2017)

- Wisconsin high school prohibited plaintiff, a 17-year-old transgender male, from using the boys' restroom
 - Plaintiff alleged violations of Title IX and the 14th Amendment
 - 7th Cir. Held: “[t]here was irreparable harm because **use of the boys’ restroom was integral to the student’s transition and emotional wellbeing.**”





Grimm v. Gloucester Cty. Sch. Bd. (4th Cir. 2019)

- Virginia high school prohibited plaintiff, a transgender male student, from using the boys' restroom at school
- Plaintiff suffered from urinary tract infections as a result of bathroom avoidance and endured suicidal thoughts
- Plaintiff alleged violations of Title IX and 14th Amendment



Grimm v. Gloucester Cty. Sch. Bd. (4th Cir. 2019) (cont'd)

- Court granted Plaintiff's motion for summary judgment
 - "there is no question that the [School] Board's policy discriminates against transgender students on the basis of their gender nonconformity. . . . Transgender students are singled out, subjected to discriminatory treatment, and excluded from spaces where similarly situated students are permitted to go."
- Affirmed by 4th Circuit in 2020
- **SCOTUS** declined to hear an appeal to the *Grimm* ruling, leaving the 4th Circuit holding in place



Title IX Proposed Regulations

- Prohibit all forms of sex discrimination, including discrimination based on sexual orientation, gender identity, and sex characteristics.
- There are limited circumstances which permit different treatment or separation based on sex (e.g., toilet, locker room, and shower facilities); under these limited circumstances, such different treatment could not be conducted in a manner that subjects a person to more than *de minimis* harm.



Title IX Proposed Regulations

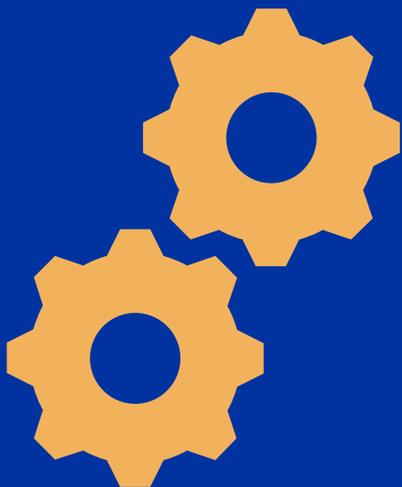
- When an institution adopts a policy or engages in a practice that prevents a person from participating consistent with the person's gender identity and that policy or practice is not explicitly allowed under Title IX, then the institution subjects the person to more than *de minimis* harm.



Title IX Proposed Regulations

- ED will issue a separate notice of proposed rulemaking for amendments to § 106.41 to address what criteria, if any, institutions may use to establish student eligibility to participate on a particular male or female athletics team.

Group Scenario



Student employee who identifies as male works with Professor Clueless for two semesters providing classroom assistance. At the start of the following semester, Student notifies Professor Clueless that she has changed her name and should be identified by female pronouns. Professor Clueless continues to refer to Student as “he” and “him” and calls her a “nice young man” on several occasions. Professor Clueless also refers to Student by her dead name. Student files a complaint alleging sex harassment.

Questions



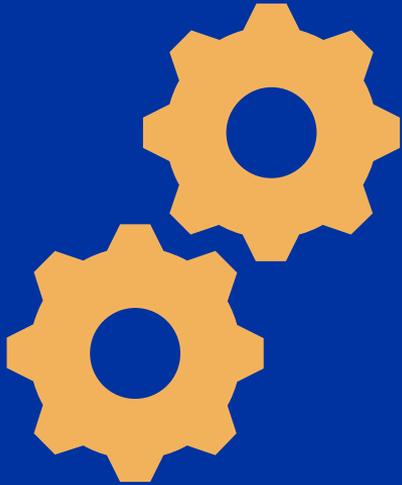


Discussion Scenarios –



Day 1 Take Aways

Group Scenario



Tech Employee makes a report that Faculty Member slapped, punched, and shoved Techie while the two were dating. Techie and Faculty Member verbally agree to engage in informal resolution.

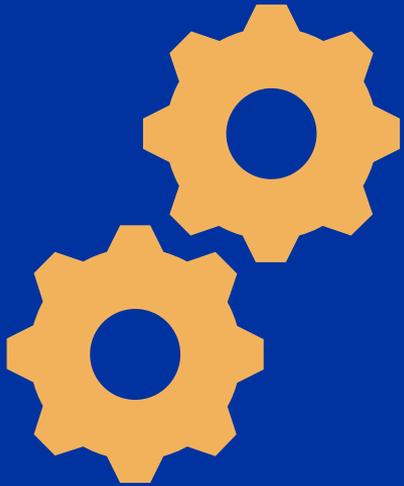
Title IX Coordinator meets separately with each party and mediates a resolution that involves Faculty Member apologizing and attending anger management classes. Each signs a term sheet. Faculty Member attends two weeks of anger management classes and then stops going. Techie then files a formal complaint based on the allegations in the previous report.



QUESTIONS

- What other policies might be implicated by this report?
- Would the institution have an obligation to take action in the absence of a formal complaint?
- Will this constitute sexual harassment under Title IX? What about under some other standard?

Group Scenario



Student A is being investigated for sexually assaulting Student B. Student A contacts various individuals who were present at a party immediately before the sexual assault and asks the individuals to sign a declaration attesting that Student B was sober and fondling Student A in front of others. One such individual is a friend of Student B's and complains to the Title IX Coordinator. Later, when Student A is given access to the investigation evidence before the conclusion of the investigation, Student A posts the entire evidentiary record online.

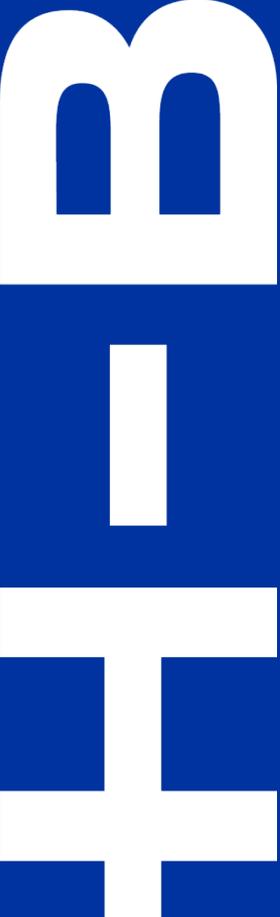


QUESTIONS

- Is Student A permitted to contact potential witnesses?
- Is Student A permitted to ask potential witnesses to sign a declaration?
- Can Student A be disciplined for posting the evidence online?
- Can the institution make a public statement in response to media inquiries prompted by Student A's publication?

Questions



The logo for Husch Blackwell, consisting of a large white stylized letter 'B' at the top, a vertical bar below it, and a stylized 'H' shape at the bottom, all on a blue background.

HUSCH BLACKWELL

**Module 8:
Investigations &
Key Issues**

Why do I need to know about Investigations?

Title IX Office

- Responsible for determinations about proceeding to investigation
- Responsible for consolidating investigations, as appropriate
- Provide supplemental notice during course of investigation
- Provide copy of report to parties/advisors

Investigators

- Responsible for carrying out investigation
- Identify, elicit and gather inculpatory and exculpatory evidence
- Make witness interview determinations

Decision-makers

- Understanding of investigation process required to make a determination and identify potential additional information needed

Others

- Important to understand differences between Title IX SH investigation process and other investigation processes



What is the purpose of an investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine
- Whether or not the reported sexual harassment occurred



What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed
- Investigation is evidence-gathering; not fact-finding



Reminder: how do we tell the parties about an investigation?

- Institution must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how” before investigating
- Remember the required elements! (see above)





May parties have an advisor during the investigation?

- Yes – Parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role *during the investigation phase*
- Institution is not required to provide an advisor *during the investigation phase*



What is the role of an advisor during the investigation?

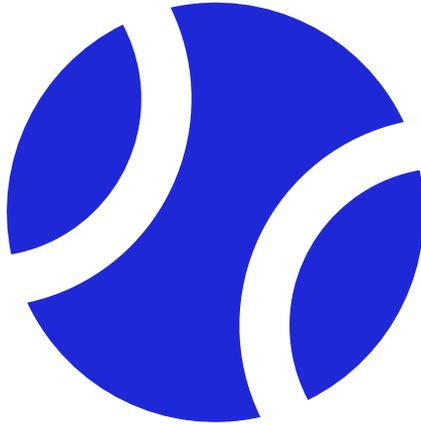
Support	Provide personal support to the party throughout
Preparation	Help the party prepare for meetings and interviews
Presence	Be present with the party during meetings and interviews
Review	Assist the party in reviewing the evidence prior to the close of the investigation

What must an advisor *not* do during the investigation?

Inhibit	Advisor cannot inhibit communication between investigator and party
Disrupt	Advisor cannot disrupt meetings and interviews
Argue	Advisor is not permitted to argue with the investigator
Evidence	Advisor does not present evidence or “make a case”



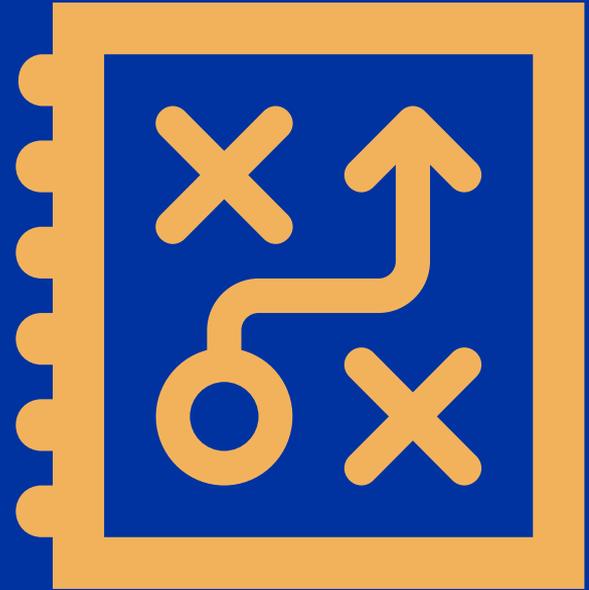
What if the advisor breaks the rules?



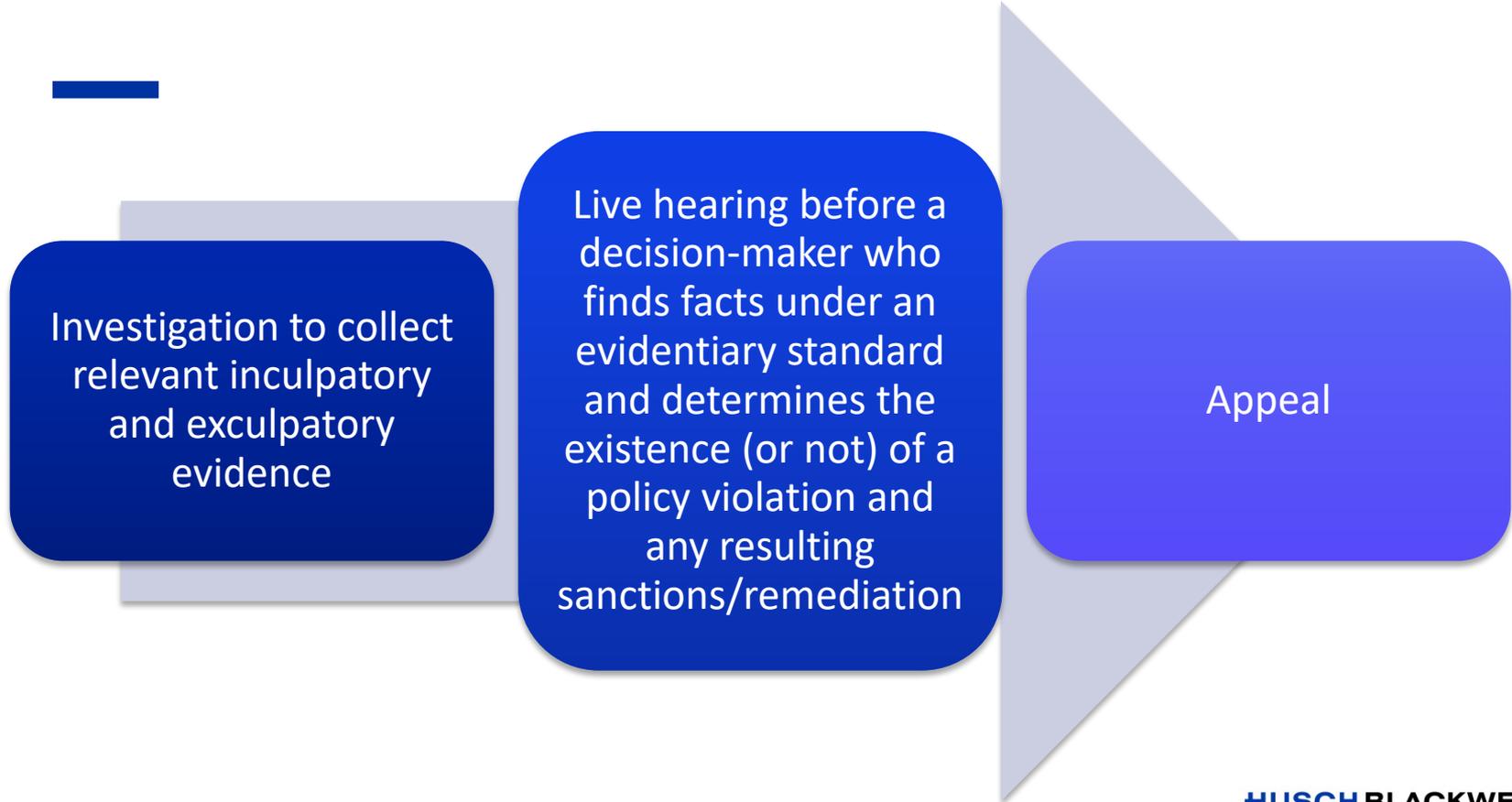
- An advisor who violates the rules may be excluded from further participation
- The University may pause the relevant interaction to allow the party to select a new advisor

Example: Advisor breaking the rules

During the interview, a party's advisor repeatedly interrupts the investigator, objects to questions, argues that the investigator should ask different questions, and attempts to present legal arguments citing caselaw.



What is the grievance process?





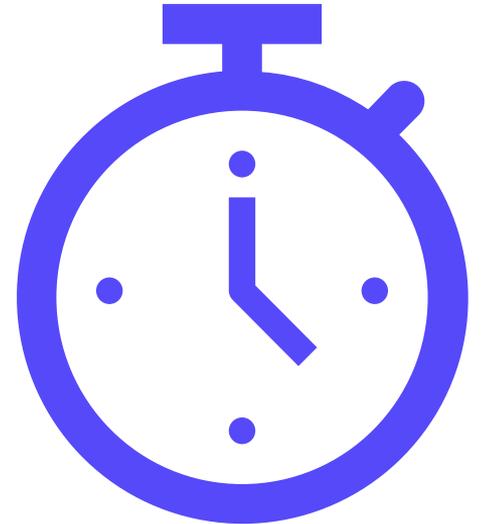
What general principles govern the grievance process?

- Equitable treatment of complainants and respondents
- No stereotypes based on a party's status as complainant or respondent
- Presumption respondent did not violate policy *unless and until* a determination is made after hearing
- Conflict and bias-free institutional participants



How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same





Standard of Evidence

Preponderance of the evidence

=

“more likely than not”

Conducting the Investigation



Investigation framework

The investigators interview the complainant, respondent, and relevant witnesses.
The investigators identify and gather evidence.

At the conclusion of evidence gathering, the investigators give the parties an equal opportunity to inspect and review evidence obtained.

After the parties have provided their written response, the investigators will create a written investigative report summarizing the relevant evidence collected.



When might I be asking questions in an investigation?

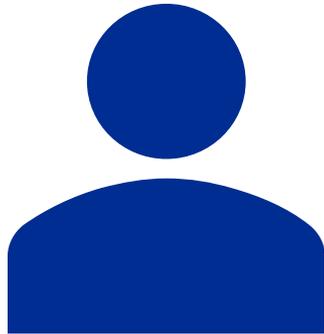
- “Little i” investigation (preliminary review of allegations, prior to notice, to determine appropriate process)
- Interviews
- Identifying other evidence
- Cross-examination (as Advisor)
- Hearings



What questions should we ask in “Little i” investigations?

- Identifying alleged victim
- Understanding scope of allegations
- In general, hold off on conducting information gathering seeking to determine whether allegations are *true* until notice has been provided

How do we collect evidence in an investigation?

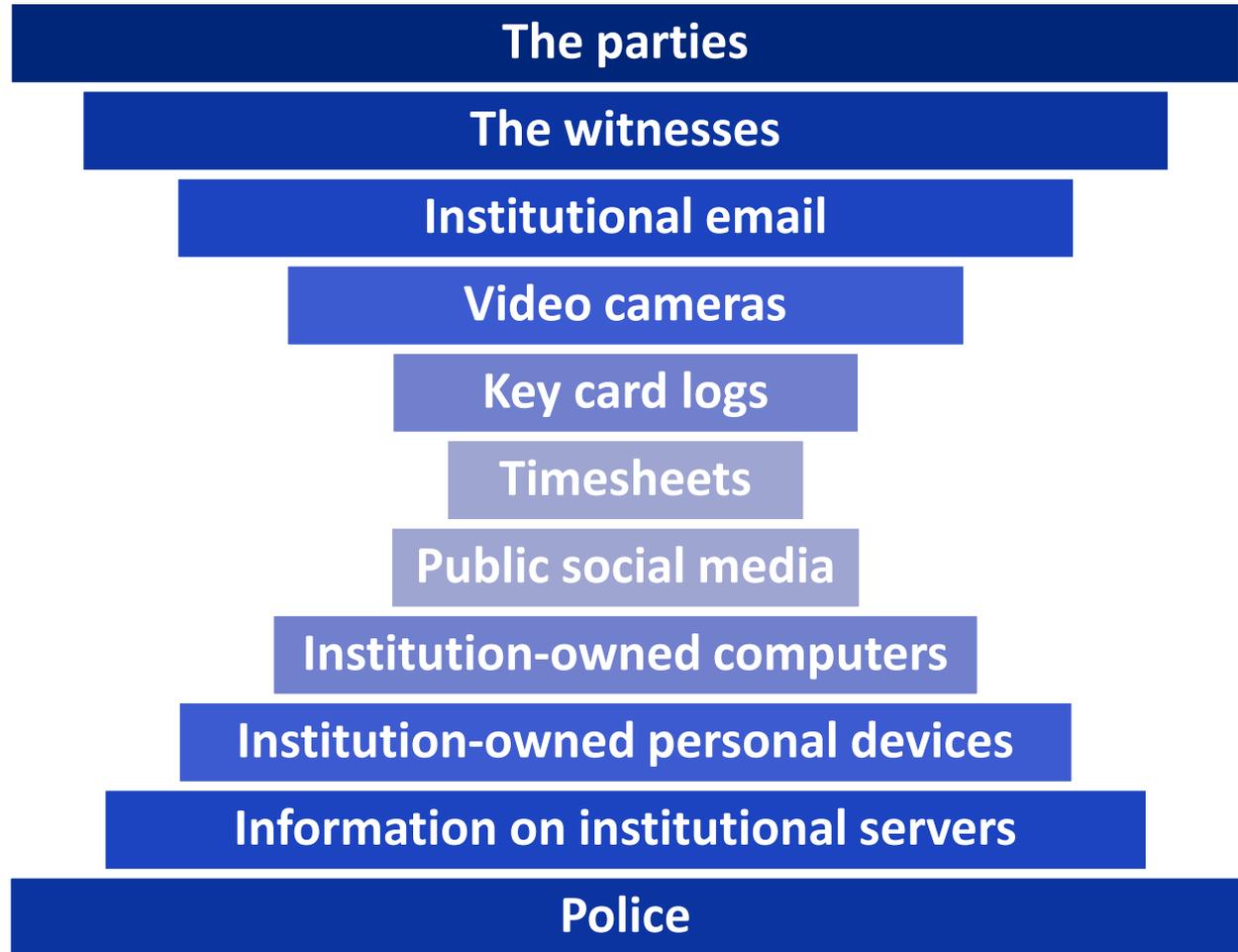


**Interviews of
Parties and Witnesses**



**Collection of
Non-Testimonial Evidence**

Example: Sources of Non- Testimonial Evidence

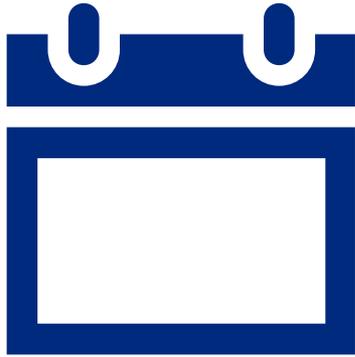




How do I know what questions to ask?

- Will vary depending on role
- Review the nature of the allegations
- Review the definition of the particular type of sexual harassment alleged
- Consider facts that would tend to establish a given element of the sexual harassment (or, in the case of advisors, would tend to establish your party's position)
- Consider questions that will bear on credibility

Practical Considerations



- Prioritize
- Create list of must-ask questions in advance
- Focus on elements of alleged violation and disputed facts
- Consider appropriate ways to guide off-track witnesses



What are some general principles about interviewing?

Timing	Conduct interviews as soon as reasonably possible to maximize the most accurate memories
Setting	Choose a private and quiet setting
Role	Maintain role as fact-gatherer; not a prosecutor; not a defense attorney
Prepare	Anticipate questions that you will be asked and have responses ready



How might we structure an interview?



Rapport building/information providing phase



Substantive testimony collection

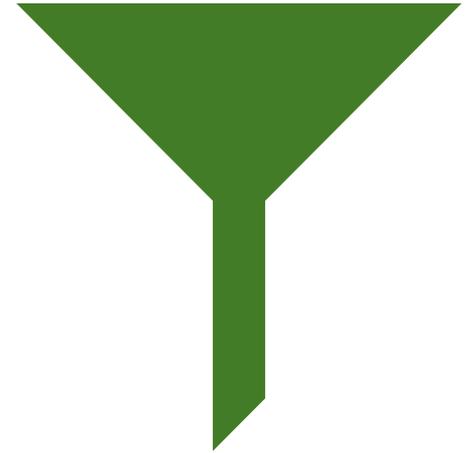


Closure/information providing phase



How do we structure questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions (“recognition prompts”) as long as possible
- Avoid suggestive or leading questions



Examples of Open Invitations



“Please tell me what happened that night.”



“Can you walk me through what happened?”



“In your own words, tell me what occurred.”



“Can you tell me everything that happened after you got to the party?”

Examples of Facilitators



Examples of Cued Invitations

“You mentioned that . . .
. . . Can you tell me more?”

“You said that Can you elaborate?”

“You said they ‘coerced’ you. Can you tell me specifically what they did?”

“If I understood you right, you said that after Can you tell me what happened in between?”

Examples of Recognition Prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

Active listening

- Active listening – “the most effective tool that exists for demonstrating understanding and reducing misunderstanding”
Gerald Goodman, *The Talk Book*
- When engaging active listening skills, you will hear both factual content, and the **feeling** accompanying that that content
- Active listening requires a set of skills that you can employ; focus on employing the same skills you would apply when trying to understand information in an emergency situation



Active listening

- What is required for effective listening:
 - Create a listening environment
 - Physical environment
 - Internal environment
 - What word can you make out of the letters of “LISTEN” that is an essential skill for effecting communication?”

Adapted with permission from “Essentials of Active Listening” – Written by Dean of University of Missouri Kansas City Law School

Active listening

Adapted with permission
from “Essentials of Active
Listening” – Written by Dean
of University of Missouri
Kansas City Law School

- Why listen?
 - To gain information, perspectives, and to understand emotions.
 - To encourage speaker.
 - To build rapport.
- Why listen actively?
 - To facilitate communication.
 - To diffuse emotions.
 - To translate content.
 - To ensure accuracy.



Active listening

- Feedback Loops
 - Paraphrase factual content
 - To check your understanding of the ideas, information, or suggestions of others, state the speaker's idea in your own words or give an example that shows what you think the speaker is talking about.
 - Check Perceived Emotions
 - To check your perception of the feelings of someone else, state what you perceive that person to be feeling.

*Adapted with permission from "Essentials of Active Listening" – Written by
Dean of University of Missouri Kansas City Law School*



Ineffective	Effective
NON VERBAL BEHAVIOR	
Listener looks bored, uninterested or judgmental; avoids eye contact; displays distracting mannerisms (doodles, etc.)	Listener maintains positive posture; avoids distracting mannerisms; keeps attention focused on speaker; maintains eye contact; nods and smiles when appropriate.
FOCUS OF ATTENTION	
Listener shifts focus of attention to self: “When something like that happened to me, I....” (attention may focus internally, as when thinking about how you would feel, respond, etc.)	Listener keeps focus on speaker: “When that happened, what did you do?”
ACCEPTANCE	
Listener fails to accept speaker’s ideas and feelings: “I think it would have been better to...”	Listener accepts ideas and feelings: “That’s an interesting idea, can you say more about it?”
EMPATHY	
Listener fails to empathize: “I don’t see why you felt that...” (or, more commonly, simply silence or ignoring feelings)	Listener empathizes, “So when that happened, you felt angry.”

PROBING	
Listener fails to probe into an area, to follow up on an idea or feeling	Listener probes in a helpful way (but does not cross examine) “Could you tell me more about that? Why did you feel that way?” “A few minutes ago you said...”
PARAPHRASING	
Listener fails to check the accuracy of communication by restating in his own words important statements made by the speaker	Listener paraphrases at the appropriate time.
SUMMARIZING	
Listener fails to summarize	Listener summarizes the progress of the conversation from time to time
ADVISE	
Listener narrows the range of alternatives by suggesting the “Solution”	Listener broadens the range of ideas by suggesting (or asking the speaker for) a number of alternatives



What are the hallmarks of effective questioning?

- Questions should be clear and precise
- Questions should relate to one or more elements of the sexual harassment alleged
- Questions should be asked in a purposeful order
- Questions should be prioritized and edited for greatest effect



General Questioning Guidelines

- Open-ended questions generate more information while closed-ended questions will clarify specifics.
- Close-ended questions result in yes/no responses that often don't offer much additional information. Use close-ended questions to obtain specifics and clarify information you have already received.
- Silence is ok: Give the witness time to answer.





General Questioning Guidelines (more)

- **Credibility:** If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the reason for your concern and indicate that you are interested in hearing the individual's response to your concern (e.g., "Help me understand...") and address inconsistencies.
- **Be professional and respectful:** Keep in mind that questioning, while sometimes necessary, may put a party or witness on the defensive.
- **Ask the difficult but relevant questions:** Give both parties an opportunity to address your concerns.



When Asking Questions . . .

- **Non-verbal communication**
 - Convey care, concern, and interest to both sides
 - Make eye-contact
- **Verbal communication**
 - Avoid questions that imply the alleged conduct occurred or did not occur
 - Avoid questions that blame or judge the complainant
 - Avoid question that blame or presume violation by respondent
 - Use medical terms for clarification

How do I know what questions to ask?

Review the nature of the allegations

Review the definition of the particular type of sexual harassment alleged

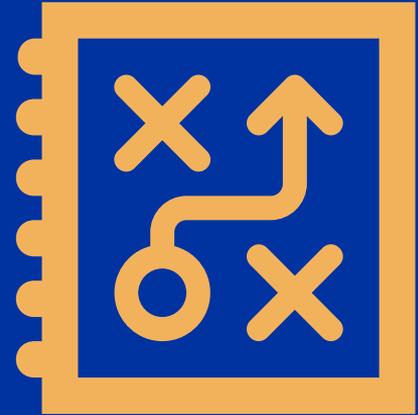
Consider facts that would help determine whether a particular element of the alleged violation is satisfied

Focus on relevant evidence (tending to make a *disputed* fact more/less true) and (for investigators) other evidence directly related to allegations

Consider questions that will bear on credibility

Example – Discussion

Complainant has accused respondent of hostile environment sexual harassment. Respondent admits to the alleged conduct but asserts it “wasn’t that bad.” Complainant alleges being so affected by the conduct that complainant stopped attending work at the institution.





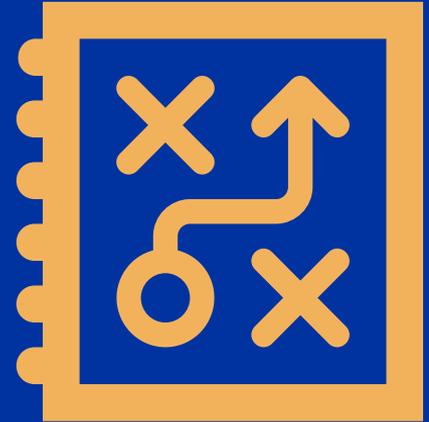
Example Questions (Effective Denial of Access)

- For witnesses
 - What did complainant say about work?
 - What did you observe about complainant's attitude towards going to work?
 - Before the respondent's conduct, did complainant go to work?
 - Did you notice any changes in complainant's behavior after the respondent's conduct?
 - After the respondent's conduct, did complainant still go to work?
 - Are there any records that would show when complainant went to work before and after the conduct? Timecards? Performance reports? Sign-ons?

Example -- Discussion

Respondent is accused of stalking complainant by lurking around complainant's car twice.

Respondent has admitted to the first instance but denies the second. Complainant reported clearly seeing the respondent's face the first time at the car but the person was not as clearly in sight as the second time.



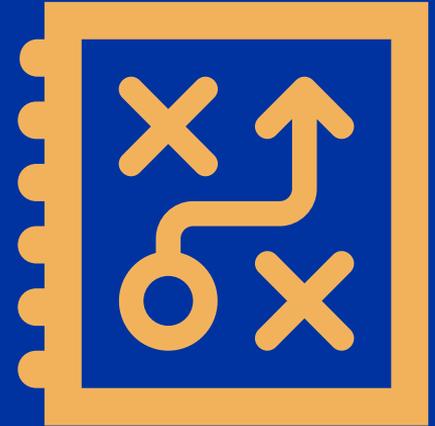


Example Questions (Complainant)

- Course of conduct
 - Tell me more about what you saw the second time? Did you actually see the respondent's face? What else do you remember about the person's appearance or attire?
 - Does having seen respondent at your car before lead you to believe respondent was there the second time? Could it have been someone else?
 - Do you actually *know* it was respondent the second time?
 - Have you had any other interactions with respondent? (Explore each)
- Directed at a specific person
 - Why do you believe this conduct is directed at you?
 - As to either incident, why was respondent at the car? Was there anything suggesting respondent went there to see you? Could there have been other reasons for Respondent's presence?
 - What did respondent do at the car each time? What did you do? Did either of you say anything?
- Fear/distress
 - What day/time did this happen?
 - Where did it happen?
 - How far was respondent from you?
 - Was there anyone else around?
 - How tall are you and how much do you weigh? How old are you? Same for respondent
 - What has the impact of this been on you? Did you tell anyone about it?

Example – Discussion

Respondent is accused of retaliating against complainant for filing a Title IX complaint by excluding complainant from work-related social events. Complainant alleges this has limited complainant's opportunities for advancement and growth in the office because most office networking is done outside the office.





Example Questions (Advancement)

- **Events:** About which events is complainant concerned? (Types, specific examples) How are events planned and invitations extended? Who has attended these events in the past and who attends now?
- **Advancement Opportunities:** What are some examples of advancement that arises out of these events? What advancement opportunities are there outside of events? Does everyone who advances attend events?
- **Respondent:** What is respondent's role with respect to events? Who plans the events? How did respondent exclude complainant? What was the result? Does respondent exclude anyone else?
- What is complainant's history of attending events? What events did complainant attend in the past? Did anything of note occur? What events did complainant not attend after the complaint? Why not? What happened at those events?



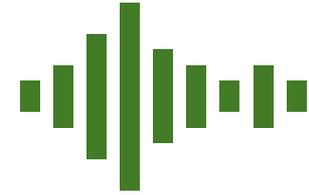
What questions should we ask to help locate other evidence?

- Beyond our discussion and witnesses, what other information might reflect what occurred?
- Where is it?
 - Do you have it?
 - Have you ever had it?
 - Who else might have it?
- What would it show?
- Examples: videos, photos, screen clips (e.g., of Snaps), texts, phone history, voicemail or other recordings, receipts or store records, credit card statements, physical injuries, clothing, maps history (phone/car),
- If provided
 - Where did you get it?
 - Is this complete? (Have you added or deleted anything?)
 - For electronic, consider asking to see original



How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview





Do parties/witnesses have a right to record the interview themselves?

- Investigation meetings are not audio or video recorded by the University and may not be recorded by any participant.
- Parties and witnesses may take notes during investigation meetings.

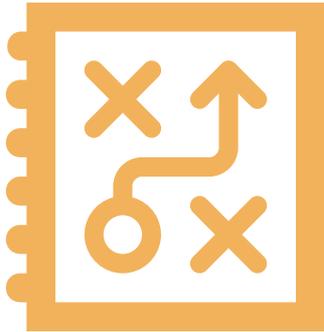


What is relevance?

Evidence is relevant if:

- It has a tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in determining the action

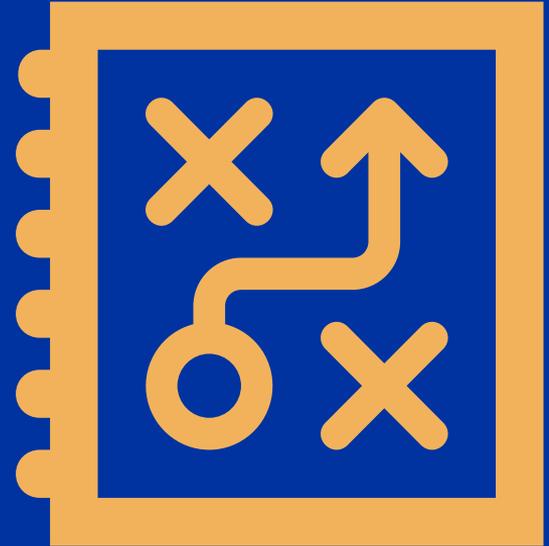
Example (relevant)



Coach is accused of sexually propositioning Player in exchange for more playing time. Witness states that: “One of the trainers heard Coach say that Player is ‘extremely attractive.’”

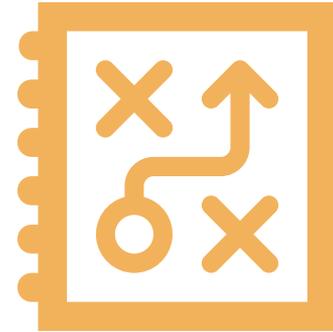
Example: Relevant

One student has accused another of stalking. Investigator asks, “Did Respondent ever threaten to harm you physically?”

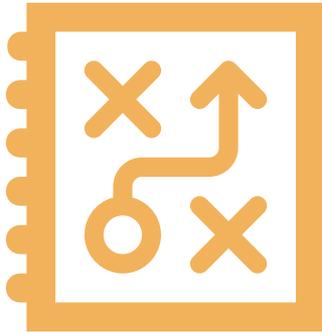


Example (not relevant) (#1)

Complainant alleges Significant Other engaged in dating violence by kicking complainant during an argument. Witness asserts: “Complainant is only dating Significant Other because of the Other family’s money?”



Example (not relevant) (#2)



Journalism student has accused Professor of sexual harassment. Witness says: “Student was convicted for driving under the influence when they were a sophomore in high school.”

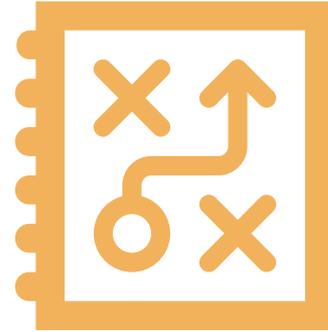


Is sexual history considered?

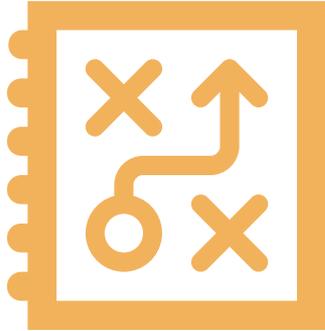
- Generally, no – Evidence of a complainant’s prior sexual behavior is relevant only if:
 - Offered to prove that someone other than the respondent committed the conduct, or
 - If evidence of specific incidents of the complainant’s prior sexual behavior with the respondent are offered to prove consent

SH Example (impermissible)

Law student has accused a faculty member of sexual harassment.
Witness asserts: “Law student slept with a number of individuals in the month before the claim.”



SH Example (permissible)



Engineering student has accused Fine Arts student of sexual assault. Engineer states that Artist had intercourse with Engineer without using a condom without Engineer’s agreement--Engineer always requires protection. Witness provides “Engineer had unprotected sex with Artist a week prior?”

Incapacity – Sample Question Topics

Physical coordination

- Walking, dancing, running, maneuvering (e.g., stairs)
- Speech
- Dexterity (phone/computer usage, using keys/key cards)
- Dressing/undressing

Ability to understand

- Topics of conversation
- What was said and tracking conversation
- Knowing the who/when/where of the situation
- Understanding what is happening generally and with regard to the conduct at issue

Other

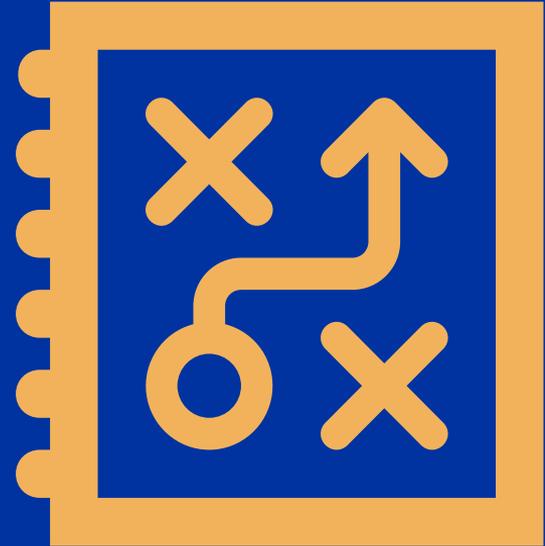
- Quantity consumed (not determinative)
- Vomiting
- Passing out/blacking out
- Sleep
- Disability/age

Respondent's reasonable knowledge of capacity

- What was respondent able to observe with respect to the above
- What should respondent have known based on the above

Capacity Example

Respondent is accused of having sex with the complainant when complainant was incapacitated due to alcohol. Investigator asks questions that may demonstrate whether complainant was able to function and fully understand the nature of sexual activity.



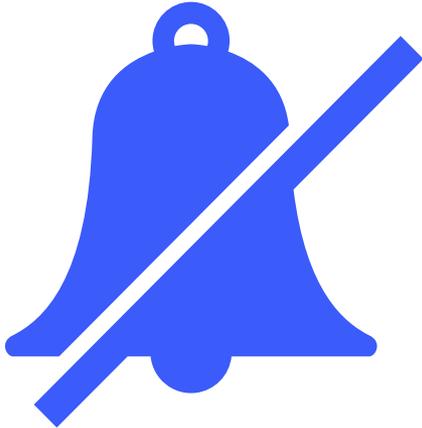


Example questions

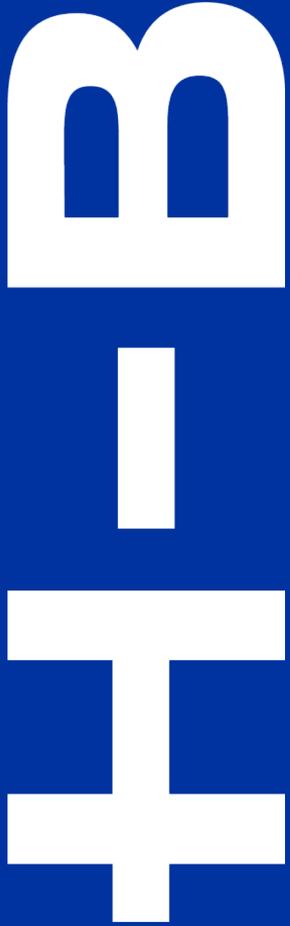
- How did you get upstairs to the respondent's apartment?
- Before the sex started, did you discuss using a condom? Did you get a condom? Where was it in relation to you and the Respondent at that time?
- Did you send any text messages immediately before or after the sex concluded?
- Did you speak with anyone on your phone immediately before or after the sex concluded?



What do we do with awkward silences?



- Give the witness time to answer
- Before answering, witnesses should pause to allow for relevance rulings



HUSCH BLACKWELL

**Module 9:
Evidentiary Concepts
for Investigators**



Key Legal Principles

- Direct vs. circumstantial
 - Hearsay
- Weight of evidence
- Assessment of credibility

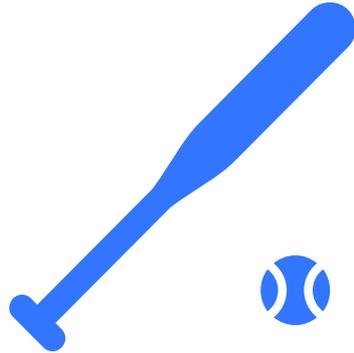


Direct vs. Circumstantial (Direct)

- Direct — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference
 - E.g.: testimony of a witness who actually observed and perceived event in question (see, hear, touch)



Direct vs. Circumstantial (Circumstantial)



- Circumstantial (indirect) — Information which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred
 - E.g., witness testimony saw student alleged to have hit someone with bat, with bloody bat an hour after the assault



Hearsay

- **Hearsay** — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principle of when courts can rely on hearsay
- Some hearsay is more reliable
 - Statement contemporaneous with the event in question
 - Excitable statement uttered in the moment being perceived

What is inculpatory evidence?

- Evidence tending to support the proposition a respondent committed sexual harassment as alleged
- Example: A text message sent the day after an incident from the respondent stating: “I never should have forced you to have sex with me after you said ‘no.’ I’m so sorry for what I did.”



What is exculpatory evidence?

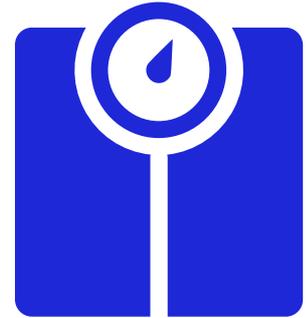


- Evidence tending to support that the respondent did not commit sexual harassment as alleged
- Example: A text message sent the day after an incident from the complainant stating: “I know that I said ‘yes’ at the time. And I knew what I was doing. But now I feel like you just used me as a one-night-stand.”



What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.





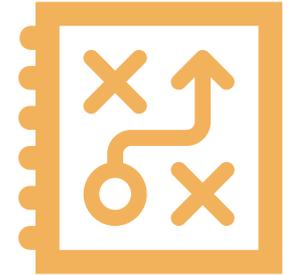
Weight - Considerations

- Believability/probability/plausibility
- Apparently honest and sincere
- Consistent
- Unrefuted
- Corroboration
- Lacking motive/disinterested
- Expertise
- Level of detail
- Unbiased
- Direct vs. circumstantial
- Personal observation vs. general knowledge or hearsay



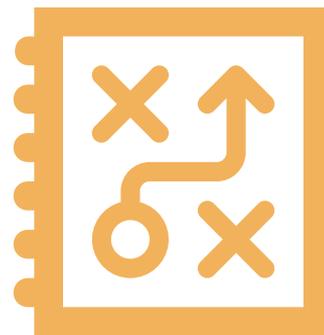
Example of considerable weight

Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.



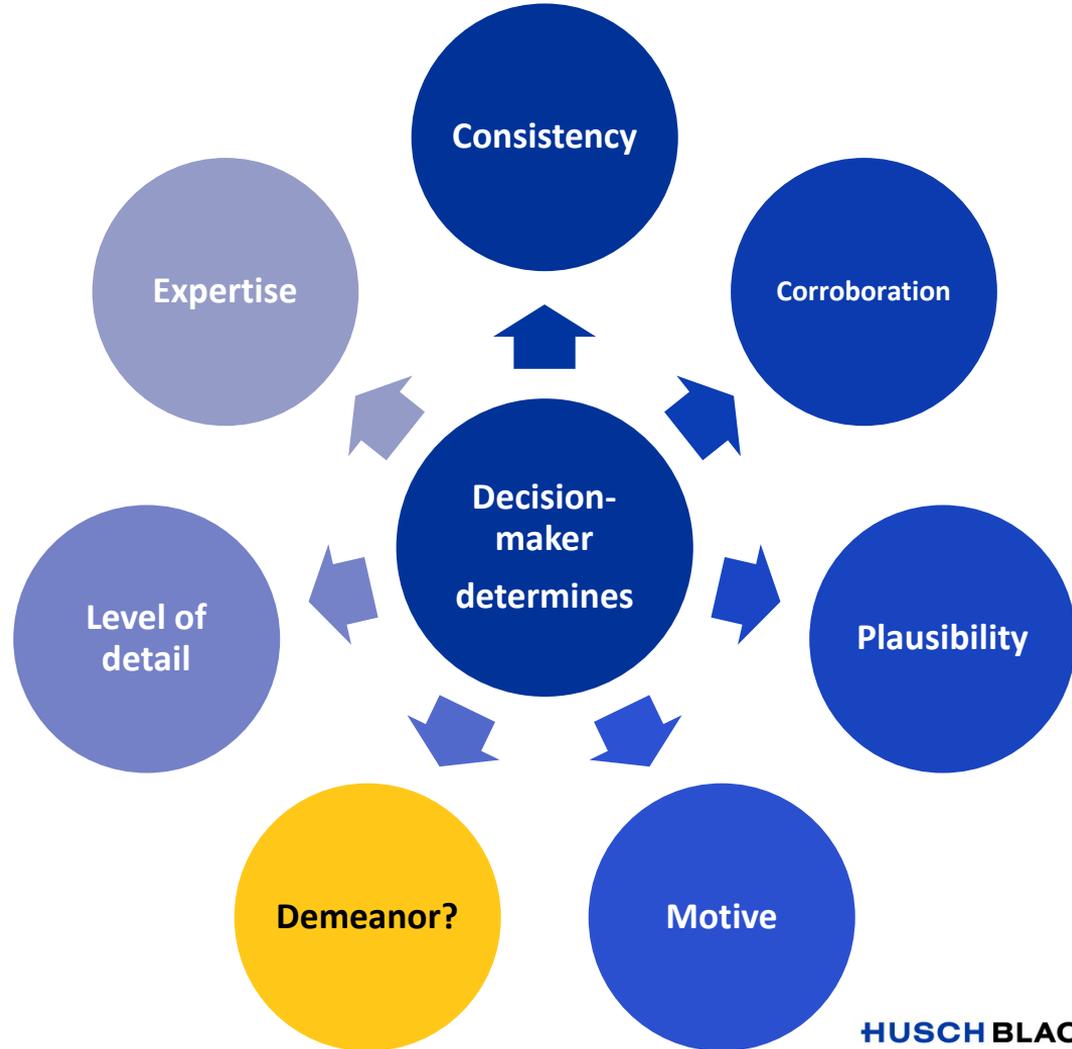
Example of less weight

Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but witness is not “sure exactly” when. Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them. But witness also says witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”



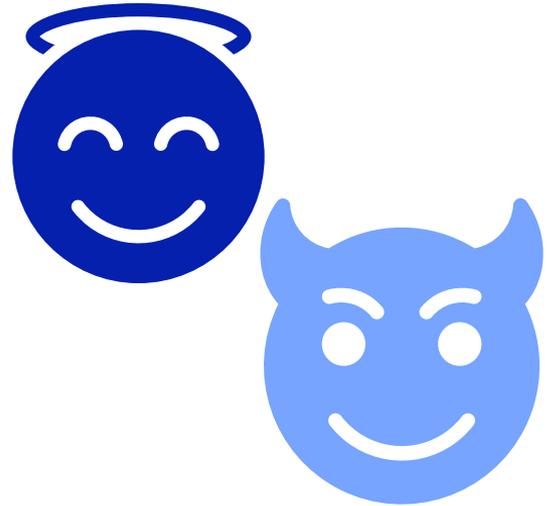
Credibility

To be determined by hearing panel, following hearing and examination of investigative report, evidence and hearing testimony



Assessing Credibility

- Plausibility—Believable?
- Corroboration—Other evidence?
- Consistency
- Demeanor
- Motive to Falsify
- Contemporaneous
- First-hand knowledge
- Influence of others
- Bias (overt/unconscious)
- Behavior after the report

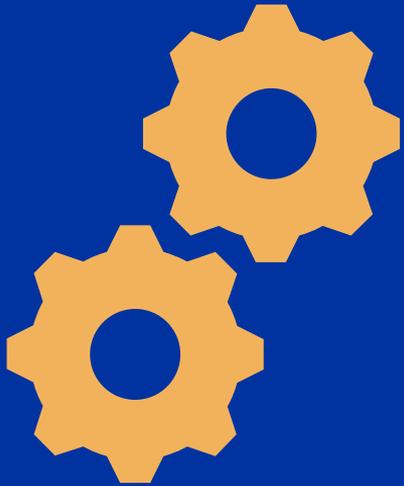


Incapacitation & Weight/Credibility

- Incapacitation alone ≠ unreliable or lack of credibility as to facts



Group Scenario: Mock Interview



Prof. Z sits on Prov. L's tenure review committee. Prof. L accuses Prof. Z of using that power differential to coerce Prof. L into performing oral sex in exchange for a strong recommendation. Prof. L states that the oral sex occurred in Prof. Z's office at 9:30 pm on a Saturday in March. Prof. Z claims this encounter occurred in late May at a party after Prof. Z submitted his tenure recommendation. Prof. Z says it was a consensual "hook up."

Z claims L has falsely accused Z of misconduct because Z refused to "date" the L after the hookup. Video shows the Z and L leaving the office building together at 9:15 pm on Saturday, March 7. Z has a text message L sent to Z on May 26 stating: "I'm so happy we can finally be together. I want to spend my life with you!"

Two other faculty members in the department claim that the Z repeatedly looked at L during department meetings in a way that was "creepy." Tenure review committee records show Z expressed skepticism about L's tenure prospects before March 7 but became far more supportive after that day and ultimately recommended L for tenure.



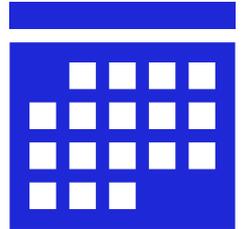
Poll question

Do the parties have access to the evidence?

- Yes, only during the hearing
- Yes, at least 10 days before the investigative report is issued
- Not usually
- It depends

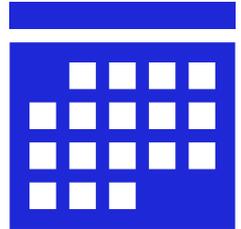
Do the parties have access to the evidence?

- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is issued
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally



Do the parties get to respond to the evidence?

- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report



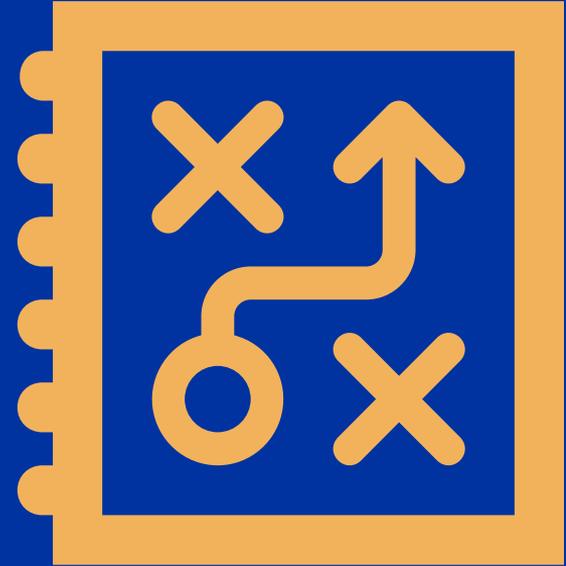


What exactly has to be shared?

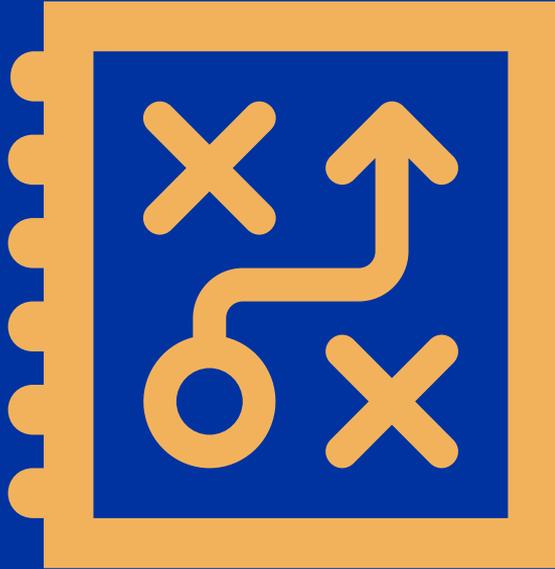
- Anything that has “evidentiary” value
- That is, the information is potentially inculpatory or exculpatory in light of the allegations at issue; or is otherwise potentially relevant
- E.g., witness statements; interview transcripts; text messages; social media posts; photographs; etc.
- Logistical communications; calendar invites; support measure communications generally are not shared

Example

Transcript of interview with complainant contains 10 minutes of initial discussion about complainant's supportive measures and access to counseling. Investigator redacts this portion of the transcript before sharing with the parties.

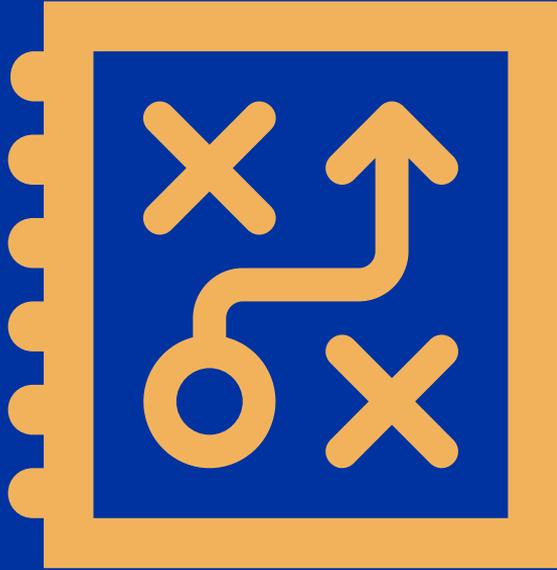


Example



Investigator had 12 emails with respondent and advisor attempting to negotiate a time and place for interview. Investigator excludes the 12 emails from the evidence made available to the parties.

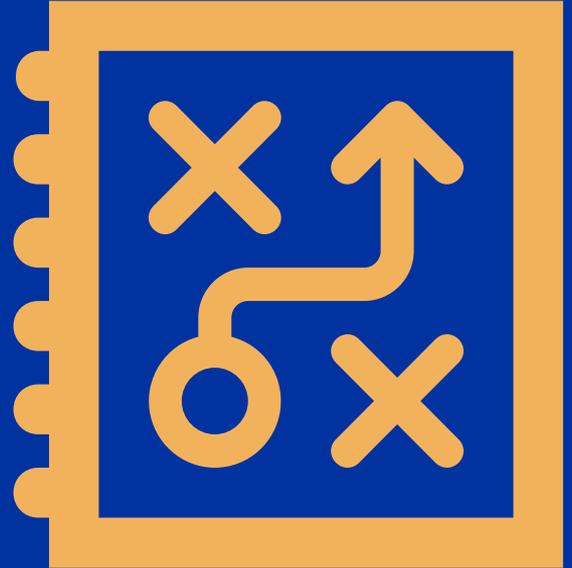
Example: Permissible



After completing all interviews, investigator uploads interview transcripts and other evidence to a secure file sharing program and sends individual links and passwords to each party and their advisor.

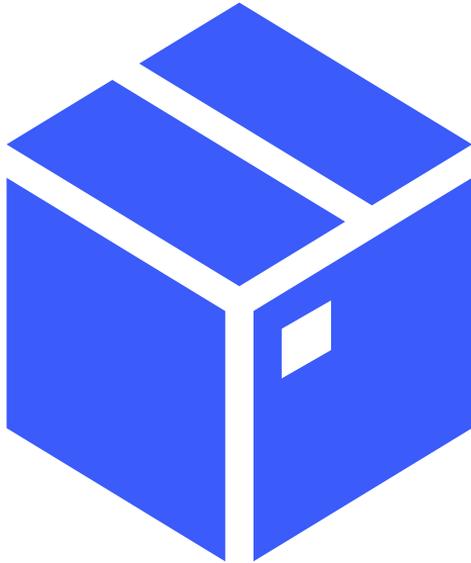
Example: Impermissible

After completing all interviews, investigator prints a copy of the evidence and tells parties they can schedule a time to review it in a conference room without cell phones.





How should we make the evidence available to parties?



- Regulation requires the evidence be sent to each party and advisor in
 - Electronic format or
 - Hard copy



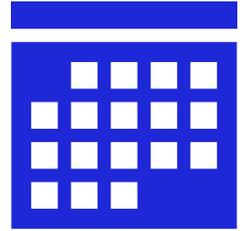
Are we required to address a party's response to the evidence?

- It depends on whether the party's comments merit a response
- If no response is merited, the party's submission can simply be appended to the final report; nonetheless recommend explaining in final report that response was reviewed, carefully considered, and did not result in any change to the report.



What is the last step in the investigation?

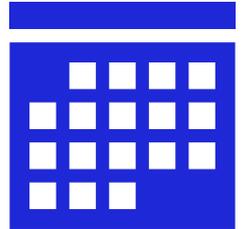
- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing

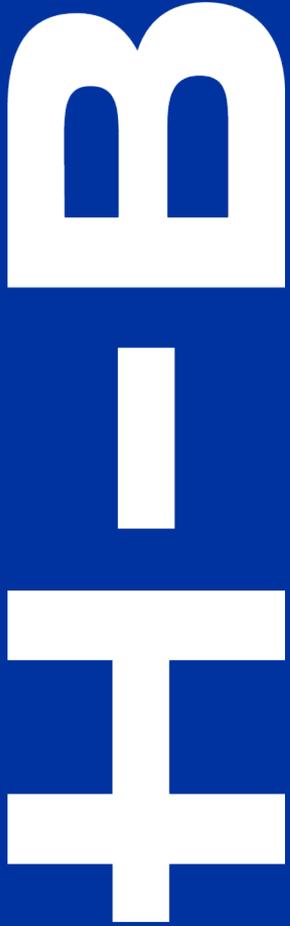




When is the investigation report finalized?

- After the 10-day period to review the evidence expires
- The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the 2020 Title IX regulation, factual findings and determinations of policy violations are made at a subsequent hearing





HUSCH BLACKWELL

**Module 10:
Investigation Report
Writing**



Does the investigation report make findings?

- No – The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the current Title IX regulations, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing



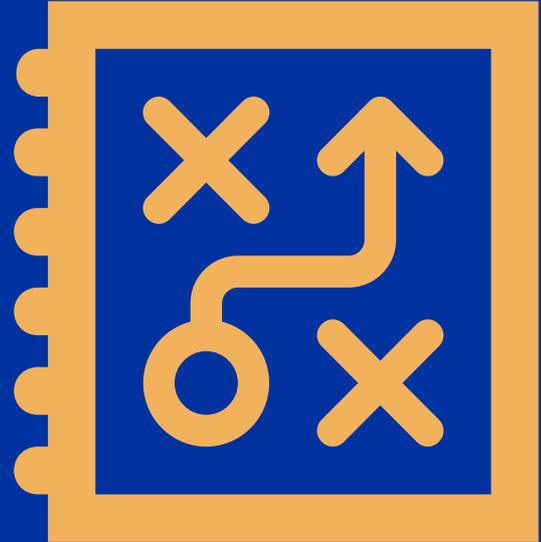
Should our investigation report comment on credibility?

- If particularly notable credibility issues arise, report should identify them
- Commentary on credibility of every party and witness is unnecessary given they will testify live at hearing



Example

During interview, a party gives one factual account. When confronted with a text message contradicting the account, the party admits to the investigator the party was not being truthful and revises the party's account. Investigator may note the party's admission in investigation report.





Investigation Report Critical Elements



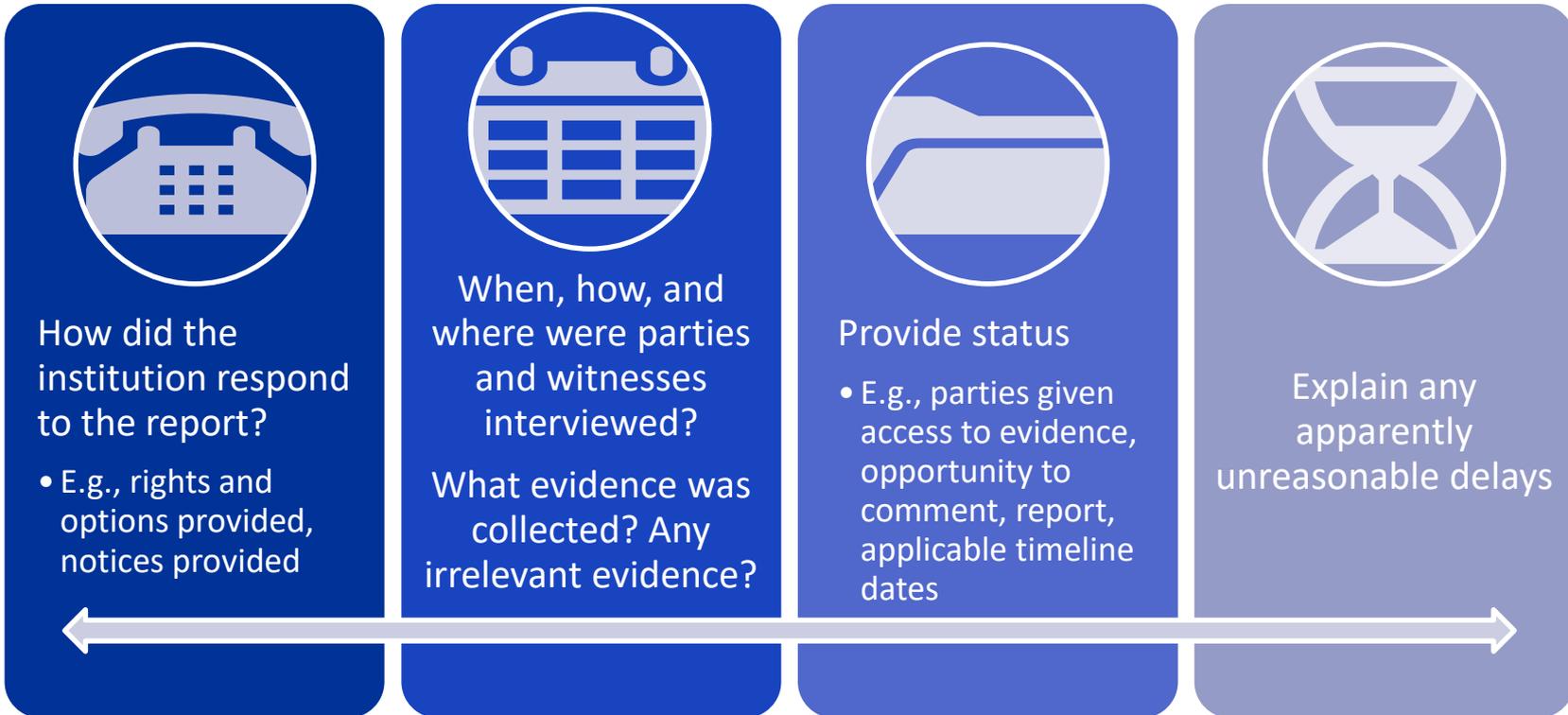
- Preliminary case information
- History of the case
- Allegations
- Applicable policies/procedures
- Standard of proof
- Evidence gathered/considered
- Evidence/Facts
 - Investigation:
 - Inculpatory and exculpatory evidence
 - Agreed upon and disputed material facts

Preliminary Case Information

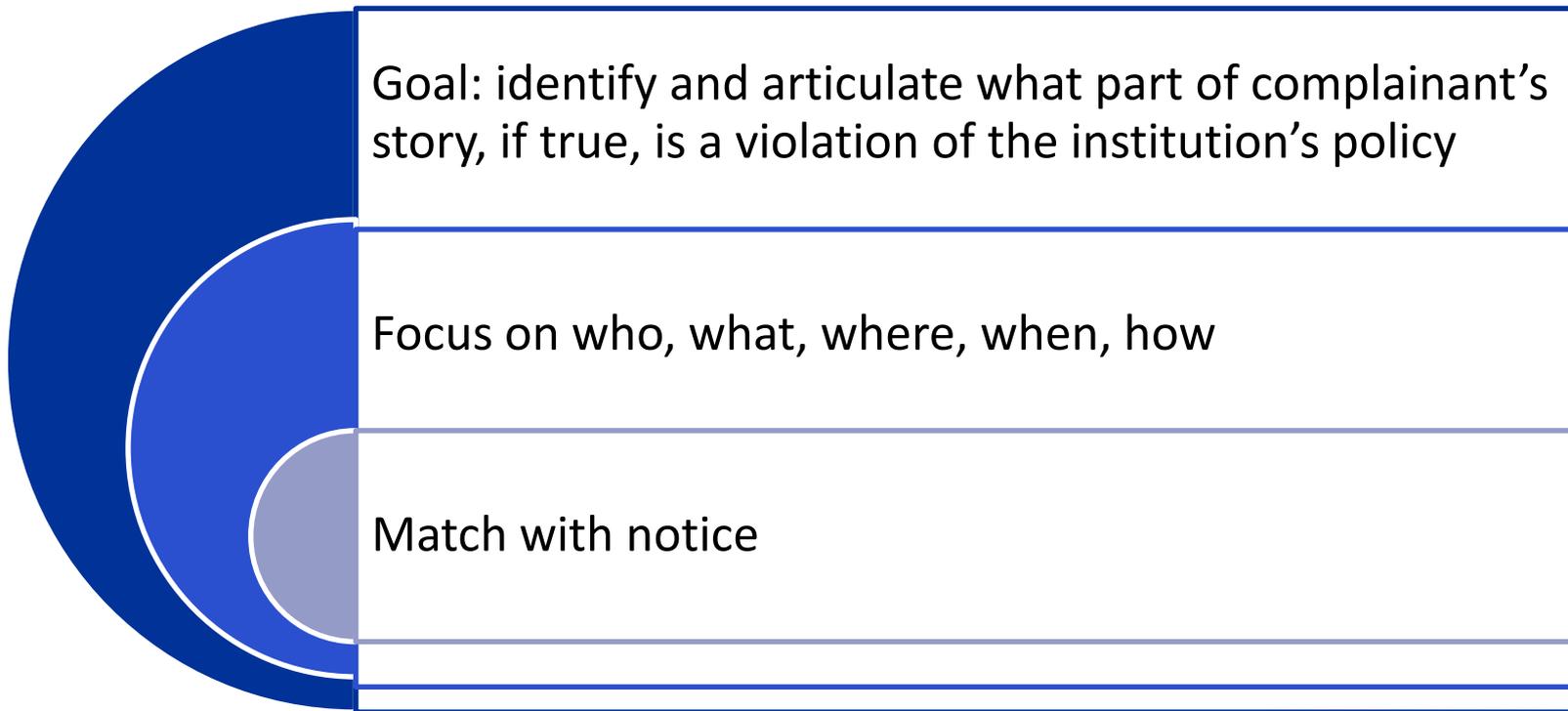
- Names of the parties
- Investigators name(s)
- When and how the case was received and assigned
- Key dates



History of the Case



Summarizing Allegations



Applicable Policies & Procedures

Reference Title IX sexual harassment policy and procedures, including specific language which is pertinent to the allegation

- E.g., include relevant definitions

[and/or] Attach full copy of Title IX sexual misconduct policy and procedures to report

Preponderance as to what?

Carefully consider elements of alleged violation

What needs to be shown to establish a violation?

Facts

Facts that matter

- Consider elements of alleged policy violation
- Which facts are relevant to each element?
- Which are disputed and undisputed?

Goals

- Investigators: identifying disputed/undisputed material facts
- Decision-makers: reaching resolution of disputed material facts

How to do this?

- Show your work
- Decision-makers: Explain your credibility assessments



Should our investigation report comment on credibility?

- If particularly notable credibility issues arise, report should identify the underlying facts that may go to a credibility analysis
 - E.g., inconsistencies, relationships between parties and witnesses
- Commentary on credibility of every party and witness is unnecessary given they will testify live at hearing



Example

Writing about
credibility points –
Investigative reports

- “Respondent was not reliable when recounting what happened.”

vs.

- “Though Respondent initially said that Respondent could not remember what happened in Complainant room, Respondent later reported recalling X.

Respondent told the Dean that Complainant actively pursued a relationship with Respondent after the night in question through text messages.

Complainant provided a text message string with Respondent in which Respondent asked Complainant to meet Respondent at the library, join Respondent at a restaurant, and come to Respondent’s room on three different occasions; in each instance, Complainant’s text messages to Respondent decline the invitations. (See Exhibit A.) Complainant denied deleting any portion of the text messages from the string, and the Investigator observed them on Complainant’s phone, showing Respondent’s phone number.”

Example

Writing about
credibility points –
Determinations



- “The Hearing Officer find that Witness is not credible.”
- vs.
- “Witness reported arriving at the office at 7 a.m. every morning and never observing Respondent speaking to Complainant before the 9 a.m. office meeting. However, key card records show that Witness did not arrive at the office until 9 a.m. on 23 occasions between March and June, and that, on 18 of those occasions, Complainant and Respondent had both entered the office. Complainant reported that Respondent often harassed Complainant early in the morning, when no one else was present. As such, there were multiple occasions on which Witness was not present to observe whether the parties were not interacting.”



Important Language Considerations

- Use objective terms
 - “Complainant” and “respondent” rather than “victim” and “perpetrator”
 - Reference potential “violation of policy” not “guilt” or violation of “law”
 - Keep in mind that decision-makers will generally assess credibility of **facts**, not **witnesses** as a whole, but-for specific circumstances
- Do not include speculation
- Do not include irrelevant points and discussion
- Be thoughtful about pronouns
- Avoid vague phrasing like “had sex”

INVEST. Example

Be specific



- “Complainant alleges that Respondent had sex with Complainant without consent.”

vs.

- “Complainant alleges that Respondent laid on top of Complainant, pulled Complainant’s underwear down with one hand, while pinning Complainant’s arms with Respondent’s other arm, penetrated Complainant’s vagina with a vibrator, while pushing Complainant against the wall next to the bed so Complainant could not move.”

INVEST. Example

Be specific



- “Evidence includes a recording of Pat and Dre in which Pat was drunk”

vs.

- “Pat provided a recording of a discussion between Pat and Dre that Pat reported recording at the Bar. In the recording, Pat states loudly, ‘I’m so wasted;’ in the remainder of the two-minute recording, though individual words can be heard, Pat’s speech is unintelligible. Pat stated this was slurring due to intoxication. Dre agreed the recording was of Pat and Dre.”

HEARING Example

(for context)

Be specific



- “Complainant is credible.”

vs.

- “At the hearing, Respondent emphasized that Complainant sent a text saying, ‘Yeah, tonight was good,’ within an hour of the alleged sexual assault. On its face, the text could be construed as inconsistent with Complainant’s report that the sexual activity that occurred the hour before the text was not consensual.

However, Complainant said that, after Respondent drove Complainant home, Complainant was in shock and sent the text in response to Respondent so Respondent would not come searching for Complainant. Complainant explained engaging in the sexual activity despite it being unwelcome by saying Complainant feared for Complainant’s safety. Complainant reported that Respondent had slapped Complainant, creating a red mark, after Complainant refused to kiss Respondent; Complainant said this occurred about 30 minutes before the sexual activity Other than the text message, Complainant’s account is consistent with Complainant’s prior statements and the witness account about overhearing the early stages of the fight over the phone. It is also plausible that one who had just experienced sexual assault would send a text to appease one’s assailant.

In contrast, Respondent’s statements have changed repeatedly since the Complaint...

As such, the Hearing Officer finds Complainant’s account more credible than Respondent’s as to what occurred before the sexual activity.”



Common “Mistakes” in Report-Writing

- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Insufficient information on important issues
- Speculation



Poll question

Do the parties get to comment on the investigation report?

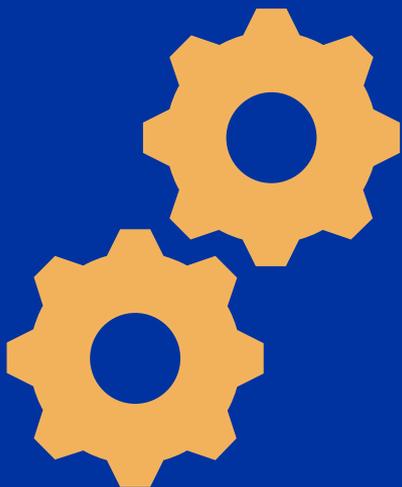
- Yes
- No
- It depends



Review of Preliminary Investigation Report

- The Investigator will provide the Preliminary Investigation Report to each party.
- The parties will be provided 10 calendar days to review the Preliminary Investigation Report and provide any additional and/or clarifying information to the Investigator. This period of 10 days will be the final opportunity for parties to submit any additional information to the Investigator.

Group Scenario

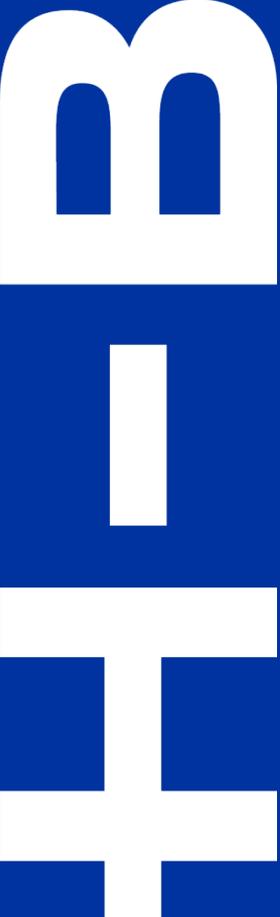


Accounting Student accuses Management Student of sexual harassment after Management Student repeatedly sends Accounting Student sexual messages on Instagram. Management Student does not respond to investigator's written request for interview. Eventually, attorney for Management Student sends letter to investigator indicating Management Student will not submit to interview and demanding complaint be dismissed because the incident occurred outside Title IX jurisdiction.

After investigator completes other interviews and makes the evidence available, Management Student's attorney sends a signed declaration from Management Student disputing the allegations and accusing Accounting Student of falsifying the complaint. Management Student's attorney also identifies six other students who Management Student wants interviewed; three will purportedly testify to Management Student's relationship with Accounting Student and the other three will purportedly testify about prior allegedly false allegations against other students made by complainant.

Questions



The logo for Husch Blackwell, consisting of a stylized white 'H' shape on a blue background. The top part of the 'H' is a rounded rectangle with two vertical bars inside, resembling a 'B'. The middle part is a single vertical bar, and the bottom part is a horizontal bar with a vertical bar extending downwards from its center.

HUSCH BLACKWELL

**Module 11: Hearings and
Appeals Summary for
Coordinators and
Investigators**

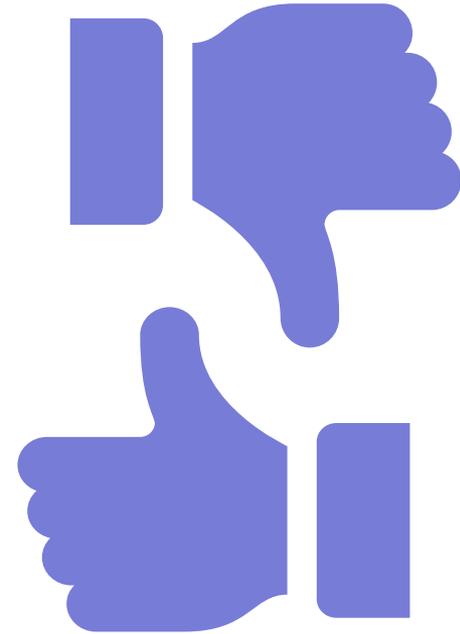


What is the purpose of the hearing?

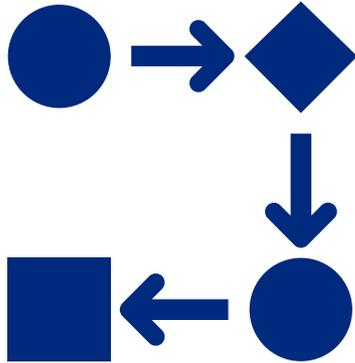
- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

What is a determination?

- The decision as to whether or not prohibited misconduct occurred
- Results in a finding of “violation” or a finding of “no violation” as determined under standard of proof



Purpose of a determination



- Moves matter to next procedural step
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers with information



Who attends a hearing?

- The decision-maker(s)
- Other necessary institutional personnel or institutional advisors (i.e., attorneys)
- The parties
- Each party's advisor
- Witnesses as they are called to testify
- Other support persons for parties, if permitted by institution



Do we provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing
- Advisor can be, but does not have to be, an attorney
- If a party does not have an advisor, institution must supply one for the purpose of questioning the other party and witnesses on behalf of the student in question

How long does a hearing last?



- Decision-maker(s) have the ability to set reasonable time limits on the hearing and its constituent parts
- Parties must have a reasonable opportunity to conduct questioning/cross-examination, but do not have the right to question/cross-examine witnesses as long as they want
- Decision-maker(s) should set an overall length to the hearing in advance and keep parties on schedule

How do(es) the decision-maker(s) decide a case?



After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



How do(es) the decision-maker(s) issue a decision?

- In a written document, provided contemporaneously to the parties that:
 - Identifies the allegations of sexual harassment
 - Describes the various procedural steps taken from the time the formal complaint was made
 - States findings of facts supporting the determination
 - Reaches conclusions regarding application of relevant policy definitions to the facts
 - Includes a rationale for each finding for each allegation
 - States the disciplinary sanctions and remedies, if implicated by the determination made, and
 - Explains the procedures and grounds for appeal



Who determines discipline and remediation?

- This is a question of institutional choice
- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- Faculty and Staff – may have different process than students
- If referred to someone else, that must occur before the written determination is issued



What principles do we use to determine discipline?

- Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors
- All things being equal, like violations should have like punishments
- Discipline has educational, punitive, and protective elements



What principles do we use to determine remediation?

- If a violation is found, institution must take steps to restore or preserve the complainant's access to education
- Various types of supportive measures may be utilized after the determination to restore or preserve access
- Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable

Appeals Summary



What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek “de novo” review





Who can appeal?

- Title IX regulation requires that either party be allowed to appeal
- Third-party persons cannot file appeals on behalf of a party



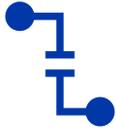
Can an institution set a time limit to appeal?

- Yes – an institution can and should require an appeal to be filed within a reasonable number of days after a dismissal or determination
- Institution may set a secondary deadline for the non-appealing party to elect to file a cross-appeal *after* the first party has appealed



What are grounds for appeal?

Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter;



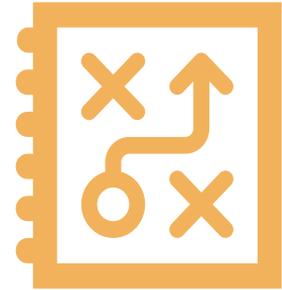
New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or



Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

Example (procedural irregularity)

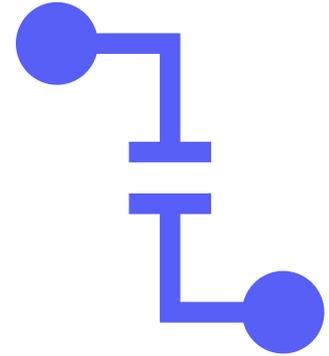
During a hearing, the hearing officer denies the respondent's advisor the right to question witnesses. The respondent appeals, citing this procedural irregularity, and argues that key witness testimony relied on by the hearing officer must be excluded because the witness was not subjected to questioning by the advisor, as required by the policy. And without such testimony, the outcome cannot be supported.





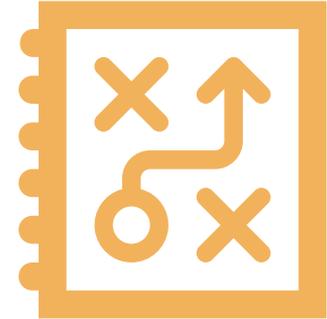
Are all procedural errors appealable?

- No – the procedural irregularity must be one that “affected the outcome of the matter”
- Errors that affect the outcome may be referred to as “prejudicial” errors
- Errors that do not affect the outcome may be called “non-prejudicial” or “harmless” errors



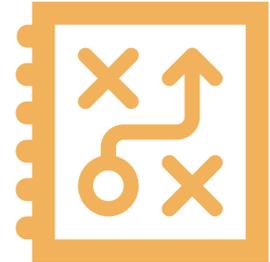
Example (harmless error)

Policy required hearing to be held within 60 days of submission of Formal Complaint. Hearing was held 61 days after submission of Formal Complaint due to a counting error. The evidence would have been the same if the hearing were held a day earlier.



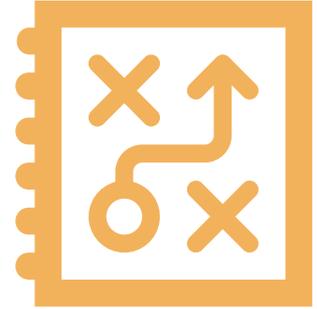
Example (new evidence)

After determination is made that respondent did not commit sexual harassment, complainant secures a previously unknown video made by a bystander at a party that depicts respondent groping complainant and complainant attempting to pull away from respondent. The bystander has been out of the country and only learned of the hearing after returning a few days ago.

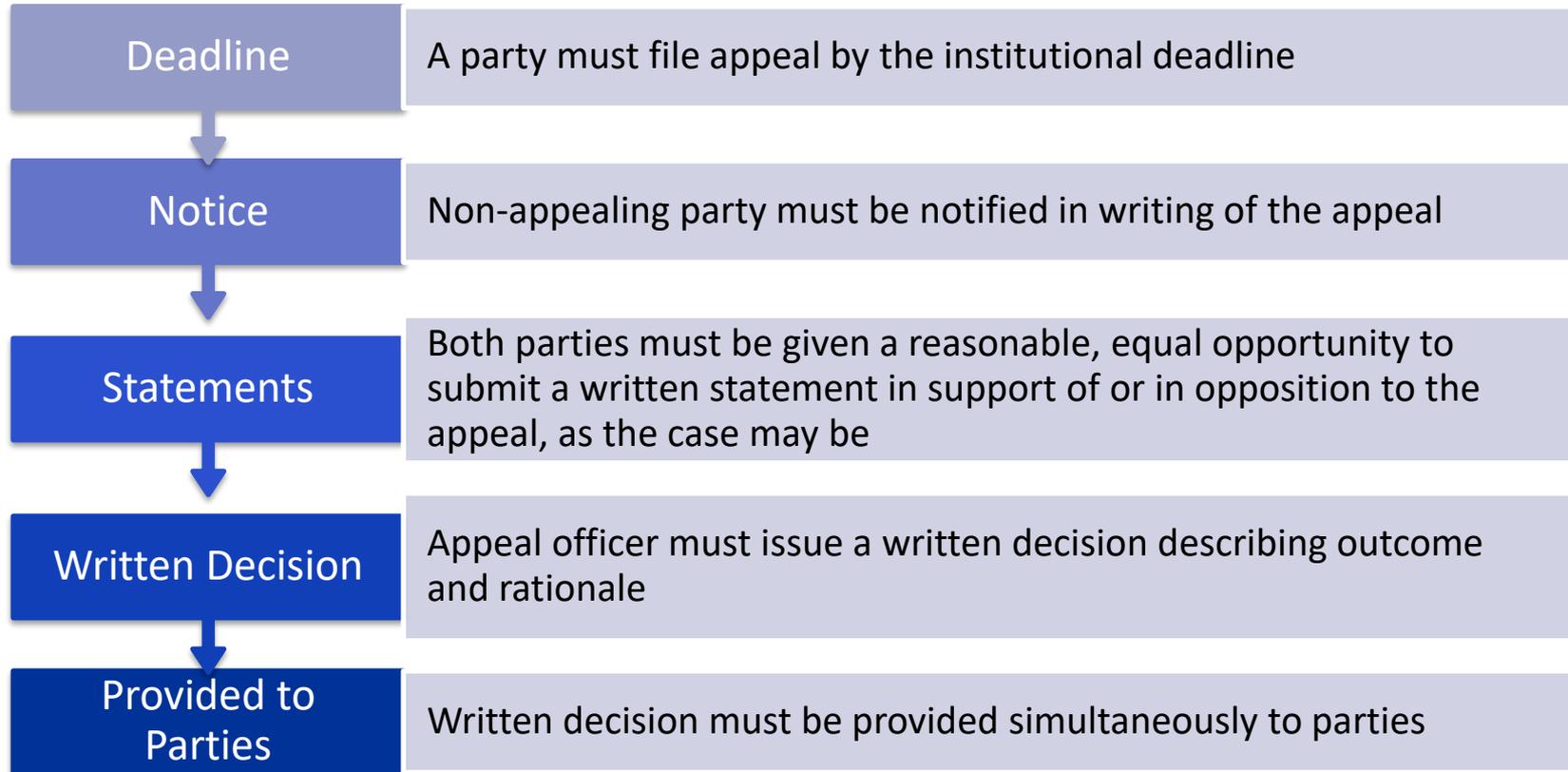


Example (conflict of interest/bias)

After determination is made that respondent committed sexual harassment, respondent sees social media post by hearing officer stating: “All victims of sexual harassment must be believed. False reports of harassment are exceedingly rare. A person accused of sexual harassment probably did it in my book.” Respondent argues bias resulted in a sham hearing with the outcome predetermined.



What is the appeal process?





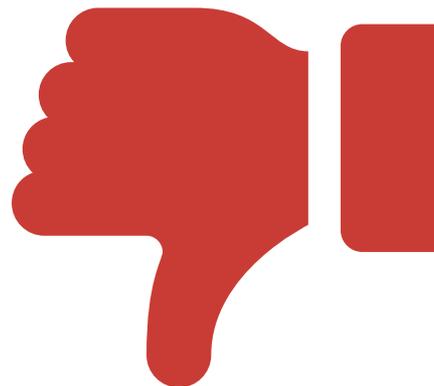
Should we ever dismiss an appeal?

- Yes – dismissal is appropriate if:
 - Appeal is filed after the reasonable deadline set in the policy
 - Appealing party does not articulate one of the three grounds for appeal



May the institution appeal if the parties don't?

- No – the institution does not take appeals of its own determinations
- In the event a formal complaint is filed by the Title IX Coordinator, the Title IX Coordinator should not have the right to appeal





How does the appeal officer make its decision?

- Appellate officer review is limited in scope to the grounds stated for appeal
- Appeal officer does not hold a new hearing
- Appeal officer must review the appeal, response, and hearing record (to the extent necessary, depending on the grounds for appeal)
- Appeal officer must then draft a written decision that states the outcome of the appeal and rationale

What are the potential outcomes of an appeal?



Appeal is denied and determination is made final



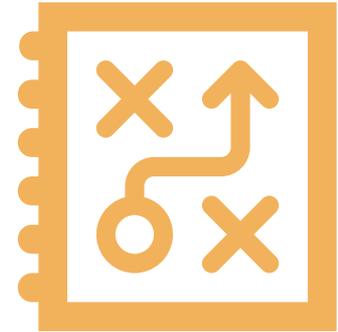
Appeal is granted and determination is changed by the appeal officer



Appeal is granted, determination is “vacated”, and appeal officer sends matter back for a new investigation and/or hearing as appropriate, depending on the nature of the error the appeals officer found

Example (procedural error)

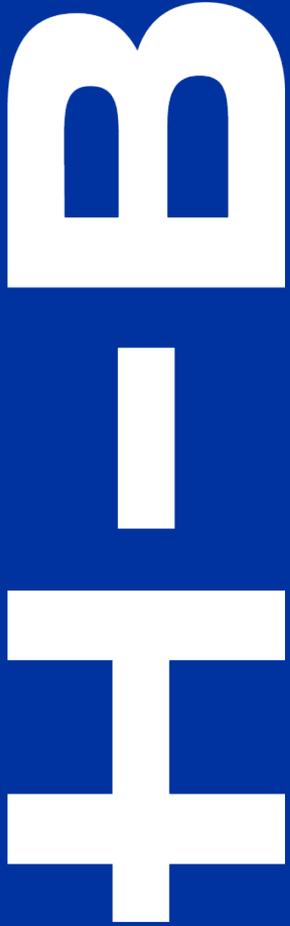
Appeals officer finds there was a prejudicial procedural error because the hearing officer failed to send notices requesting several of the respondent's key witnesses appear. Appeals officer vacates the adverse finding against the respondent and directs that a new hearing take place after appropriate notices to appear have been issued.





Is there further review after appeal?

Unless policy expressly provides for second level appeals (not recommended), President and Board should not entertain pleas for additional review.



HUSCH BLACKWELL

**Module 12:
Pregnancy
Discrimination**

Legal Requirements

- Applicable Laws:
 - Title IX
 - Pregnancy Discrimination Act
 - ADA/Section 504
 - State and local civil rights laws





Pregnancy Discrimination Act

Title VII, as amended by the PDA, prohibits *employment* discrimination based on:

- Current pregnancy
- Past pregnancy
- Potential or intended pregnancy
- Medical conditions related to pregnancy or childbirth



ADA / Section 504

- Federal laws that prohibit disability discrimination and require institutions to make reasonable accommodations to qualified individuals with a disability.
- Disability = A physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.
- Pregnancy itself is not a disability, but complications from pregnancy or childbirth may qualify.

Title IX Regulations: Gender-Neutral Rules



A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

34 CFR § 106.40(a)

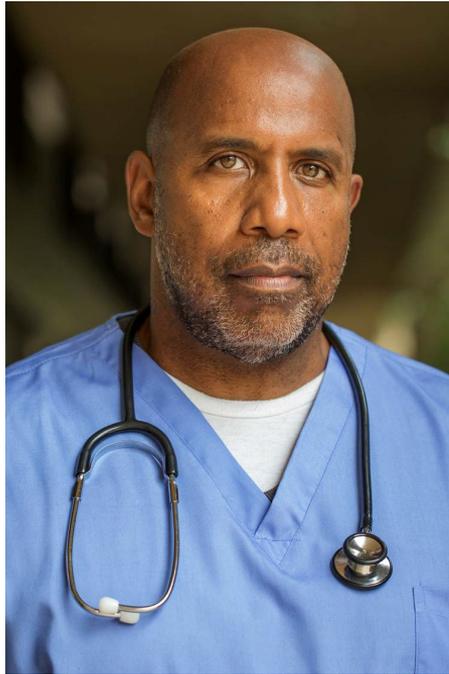
Title IX Regulations: Equal Participation

A recipient shall not discriminate against any student or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. 34 CFR § 106.40(b)(1)





Title IX Regulations: Medical Certification



A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

34 CFR § 106.40(b)(2)



Title IX Regulations: Separate Programs

A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the separate portion is comparable to that offered to non-pregnant students.

34 CFR § 106.40(b)(3)



Title IX Regulations: Temporary Disability Policies

A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

34 CFR § 106.40(b)(4)



Title IX Regulations: Leaves of Absence

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

34 CFR § 106.40(b)(5)



OCR Guidance: Administrative Measures

Schools **MUST**

- Protect students from harassment based on pregnancy or related conditions.
- Possess and distribute a policy against sex discrimination. OCR recommends the policy make clear that sex discrimination covers discrimination against pregnant and parenting students too.





OCR Guidance: Administrative Measures

Schools **MUST**

- Adopt and publish grievance procedures for students to file complaints of sex discrimination, including discrimination related to pregnancy or parenting.
- Identify at least one employee to carry out Title IX responsibilities.



OCR Guidance: Day-to-Day

Schools **MUST**

- Allow pregnant students to continue participating in classes and extracurricular activities.
- Allow pregnant students to choose if they want to participate in special programs or classes for pregnant students. Schools may not pressure students to participate in these types of programs.
- Provide reasonable adjustments such as a larger desk or elevator access.





OCR Guidance: Day-to-Day

Schools **MUST**

- Allow pregnant students to return to the same academic and extracurricular status as before medical leave, including the opportunity to make up missed work.
- Ensure that teachers understand the Title IX requirements. Teachers may not prohibit students from submitting work after a deadline missed due to pregnancy or childbirth. Students should be permitted to make up missed participation and attendance credits.



OCR Guidance: Medical Accommodations

Schools **MUST**

- Excuse absences due to pregnancy or childbirth for as long as medically necessary.
- Provide pregnant students with the same special services they provides to individuals with temporary medical conditions, including remote instruction, tutoring, and/or independent study.



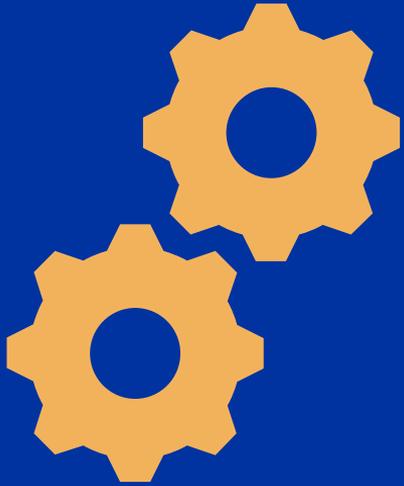


OCR Guidance: Medical Accommodations



- Schools may only require pregnant students to submit a doctor's note if the school also requires a doctor's note from all students who have a physical or emotional condition requiring treatment by a doctor.

Group Scenario



Amy is enrolled in an accelerated program at Husch College of Nursing. Two months into the eight-month program, she notifies the nursing director that she is pregnant and is due in February. The nursing director reminds Amy that the college has a zero-absence policy and if she misses more than two consecutive days of class or clinical, she will be dismissed from the program. When Amy delivers her baby, she misses two days of class, including one pop quiz, and three days of clinical. She receives a zero for the absences in accordance with the college policy, which is applied consistently to all students regardless of the reason for the absence. Amy files a complaint alleging that she should have been allowed to make up the missed quiz and clinicals.



Salt Lake Community College

June 2022 OCR Decision

- A student at SLCC found out she was pregnant after the semester began. She told her professor she was pregnant and struggling with morning sickness, which caused her to miss or be late to the professor's classes.
- The student requested academic adjustments from the professor to allow for additional absences and allow her to turn in assignments late.



SLCC: Background

- The professor told the student that she was concerned the student decided to continue with the class and that she had lowered final grades if missed days were excessive. The professor also told her a late submission penalty would apply to late assignments and advised the student to drop the class because “health is more important than a class.”
- The student contacted the Disability Resource Center on her own to seek formal academic adjustments and provided a note from her treating physician. An Advisor spoke with the student and referred the student to the Title IX Coordinator to discuss her adjustments.
- The Title IX Coordinator determined the student’s requested academic adjustments constituted a fundamental alteration to the courses.



SLCC: OCR Findings

- The professor's alleged comments encouraging the student to drop the class could constitute pregnancy discrimination and therefore merited a prompt and equitable resolution under Title IX grievance procedures (which SLCC did not conduct).
- The Title IX Coordinator did not create an investigatory file, obtain written statements, take notes of his conversations, or issue a notice of the investigation's outcome to the student.



SLCC: OCR Findings

- The Title IX Coordinator did not respond to the student's allegation the professor encouraged her to drop the class because of her pregnancy, which she viewed as discriminatory.
- SLCC did not engage in the interactive process with the student to determine appropriate academic adjustments in light of her pregnancy.



SLCC: OCR Findings

- To the extent SLCC determined the student's requested adjustments would have constituted a fundamental alteration, SLCC did not engage in a proper deliberative process in making such determination.
- SLCC did not consider whether the student's pregnancy caused a temporary disability or engage in the interactive process under Section 504.



SLCC: OCR Findings

- SLCC's failed to excuse the student's absences and tardies caused by her pregnancy in violation of Title IX.
- SLCC's website does not contain information on how a student may file a complaint alleging pregnancy discrimination, nor does SLCC mention pregnancy discrimination in their Student Code.



SLCC: Voluntary Resolution Agreement

- Revise its Nondiscrimination Statement to include reference to actual or potential parental, family, or marital status, including pregnancy and related conditions.
- Revise its grievance procedures to include information regarding students' opportunity to file a grievance based on alleged pregnancy discrimination, including grievances related to different treatment based on pregnancy, exclusion from the College's programs or activities based on pregnancy, or the College's failure to excuse pregnancy-related absences or provide appropriate academic adjustments in the same manner as it provides academic adjustments to students with temporary disabilities.



SLCC: Voluntary Resolution Agreement

- The College will provide information on its Title IX and Disability Resource Center webpages that describes the process under which pregnant students can seek academic adjustments, including:
 - the rights of pregnant students under Title IX;
 - how to request academic adjustments, special services, excused absences, or leaves of absence;
 - the process the College follows to determine appropriate academic adjustments and special services;
 - the process available to students if the College denies requested academic adjustments or special services; and
 - the process the College uses to determine when a requested academic adjustment constitutes a fundamental alteration of a program or activity.



SLCC: Voluntary Resolution Agreement

- Training for the professor, all staff in the DRC, and all staff in the Title IX office
- Conduct investigation into student's allegations of discrimination
- Promptly take any necessary steps to remedy any discrimination that is found



Title IX Proposed Regulations

- Include explicit protections for students and employees based on pregnancy or related conditions, including childbirth, termination of pregnancy, or lactation.
- Institutions would be required to provide reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for students and employees.



Title IX Proposed Regulations

- The proposed regulations would expand the scope of protections for pregnancy or related conditions by prohibiting institutions from discriminating against a student or employee based on current, potential, or past pregnancy or related conditions.



Title IX Proposed Regulations

- When a student tells an institution's employee about the student's pregnancy or related conditions, the employee must provide the student with the Title IX Coordinator's contact information.
- The Title IX Coordinator must inform the student of the institution's obligations to prohibit sex discrimination and also to provide the student with options for reasonable modifications, access to separate and comparable portions of education programs or activities, allow for a voluntary leave of absence, and ensure there is available lactation space that is clean and private.



Title IX Proposed Regulations

- Reasonable modifications for pregnancy or related conditions would be required to be provided to students based on their individualized needs.
- Such modifications may include breaks during class to attend to related health needs, breastfeeding, or expressing breast milk; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; time extensions for coursework and rescheduling of tests; counseling; changes in physical space or supplies; elevator access; or other appropriate changes to policies, practices, or procedures.



Common Policy & Practice Problems

- Zero absence attendance policies.
- Targeted medical documentation requirements.
- Requirements to restart programs from the beginning rather than status at the time a leave began.
- Deference to discriminatory clinical site policies.

Practical Guidance: Inclusive Language and Policies



- Much of the statutory language surrounding pregnancy is not gendered.
- Students of many genders, including cisgender women, non-binary people, and transgender men, might be pregnant.
- Regardless of a student's gender-identity, they are protected through their status as a pregnant person.



Practical Guidance: Faculty and Staff Training

- Many pregnancy discrimination investigations share a common theme: students reach out to faculty and staff members who are not familiar with the rights of pregnant students.
- **Solution: Inform all faculty and staff of the rights of pregnant students under Title IX.**



Practical Guidance: Review Institutional Policies

- Another common problem OCR identifies is school Title IX policies which do not specifically address pregnancy.
- Clear, written guidelines will allow faculty and staff to understand their obligations towards pregnant students, as well as provide pregnant students with clear expectations for available support.
- **Solution: Review institutional policies to ensure pregnancy discrimination is explicitly addressed.**



Practical Guidance: Review Institutional Procedures

- A common challenge OCR often finds in pregnancy discrimination cases is a lack of prompt responses to student Title IX grievances.
- Individuals who express concerns about any type of discrimination, including pregnancy discrimination, should receive prompt responses to those concerns.
- **Solution: Evaluate your school's grievance procedures. Does every student receive a response to a report of discrimination? Is that response timely?**

Questions





Wrap Up



Day 2 Take Aways

HUSCH
BLACKWELL